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# In the Supreme Court of the United States

October Term, 1986

CHICAGO BRIDGE AND IRON COMPANY,
a corporation,

Petitioner,

vs.

DEPARTMENT OF LABOR AND INDUSTRIES
OF THE STATE OF WASHINGTON, and
REX T. NISSEN,

Respondents.

## PETITION FOR WRIT OF CERTIORARI

## TO THE COURT OF APPEALS, DIVISION III,

## STATE OF WASHINGTON

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## QUESTIONS PRESENTED

In 1971, the Washington State Legislature permitted employers to become self-insurers under the State Workers Compensation system. That legislation did not modify the statutory provisions whereby "the employer" was eligible for second injury relief "whenever" a worker with a previous disability or handicap sustains another injury resulting in permanent total disability. The issues are:

1. Whether Chicago Bridge and Iron received sufficient notice under the due process clause of the Fourteenth Amendment that by electing to become a self-insurer it would be ineligible for accrued second injury fund benefits to defray the cost of injuries to previous handicapped workers.

2. Whether ambiguous state legislation controlling the rights of self-insured employers' eligibility for second injury fund benefits for injuries to previously handicapped workers provided sufficient notice under the due process clause of the Fourteenth Amendment to the United States Constitution.

3. Whether the State of Washington by and through the Department of Labor and Industries has deprived Chicago Bridge and Iron Company of due process of law by eliminating access to second injury fund relief during the years 1971 to 1977 for injuries to previously handicapped or disabled workers without providing any clear statement of legislative intent or mechanism by which it might have learned of the intent to exclude self-insured employers from second injury fund benefits.

## PARTIES TO THE PROCEEDING

Petitioner (who was plaintiff in the superior court, appellant in the court of appeals, and petitioner to the Washington Supreme Court) is Chicago Bridge and Iron Company, a self-insured employer in the State of Washington. The parent company of Chicago Bridge and Iron Company is CBI Industries, Inc. A list of the subsidiaries and affiliates of CBI Industries, Inc. may be found in Appendix H (p. 28a), *infra*.

Respondent is the Department of Labor and Industries for the State of Washington (who was defendant in the superior court, appellee in the court of appeals, and respondent before the Washington Supreme Court). Petitioner believes that Rex T. Nissen (claimant before the Board of Industrial Appeals) has no interest in this Petition.

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DEPARTMENT OF LABOR AND INDUSTRIES
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REX T. NISSEN,
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## PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

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Chicago Bridge and Iron Company petitions for a writ of certiorari to review the judgment of the Court of Appeals, Division III, of the State of Washington in this case filed on December 18, 1986.

## OPINIONS BELOW

The opinion of the Court of Appeals, Division III, State of Washington (App., *infra,* la-6a) is reported at 46 Wn. App. 252, 731 P.2d 1 (1986). The order of the Washington State Supreme Court (App., *infra,* 8a) is reported at 107 Wn.2d. 1032. The opinions, decisions and orders of the Superior Court for Okanogan County (App., *infra,* 11a-16a) are not reported. The opinion of the Board of Industrial Appeals (App., *infra,* 17a-27a) is not reported.

## JURISDICTION

The judgment of the Court of Appeals, Division III, State of Washington, was entered on December 18, 1986. A timely petition for discretionary review was denied by the Washington State Supreme Court on March 3, 1987. The jurisdiction of this court is invoked under 28 U.S.C. 1257(3).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. ***Fourteenth Amendment, United States Constitution***

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law . . ."

2. ***Washington State Workers' Compensation Act***

The pertinent provisions of the Washington State Industrial Insurance Compensation Act, Revised Code of Washington, Title 51, are set forth in Appendix J, *infra,* 31a - 42a.

## STATEMENT OF THE CASE

This petition seeks review of a judgment of the Court of Appeals, Division III, of the State of Washington which declared that self-insured employers are not entitled to access to the second injury fund where the last injury[1] occurred between 1971 and 1977. Chicago Bridge and Iron contends that the 1971 amendments to the Workers' Compensation Act are wholly inadequate to provide notice that the legislation would eliminate self-insured employers access to accrued interests in the second injury fund.

### A. *Rex T. Nissen Sustains Injuries in 1940, 1957 and 1974 and Seeks Benefits for Permanent Total Disability.*

Rex T. Nissen was injured in an accident on February 25, 1974 during the course of his employment for Chicago Bridge and Iron at Grand Coulee Dam, Okanogan County, Washington. A co-worker was killed in the accident. Mr. Nissen had sustained two previous injuries. First, in May, 1940, Mr. Nissen crushed his fourth, fifth, sixth and seventh cervical vertebrae in a rodeo accident, and, in October, 1957, Mr. Nissen threw a toolbox onto his shoulder while working in Montana and injured his eighth and ninth cervical vertebrae.

After his last injury in 1974, Mr. Nissen applied for

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[1] "Last injury" refers to a work-related injury or disability that results in permanent total disability or death after a previous disability.

workers compensation benefits with the Washington State Department of Labor and Industries ("Department"). The Department awarded benefits for 20 percent permanent partial disability and in June, 1975, the claim was closed. The claim was then reopened and closed several times. The Department further ordered Chicago Bridge to deposit into the pension reserve fund 100 percent of the amount required to pay the pension. Chicago Bridge and Iron timely appealed these orders.

On November 2, 1983, the Board of Industrial Insurance Appeals concluded that Mr. Nissen's permanent total disability was due to the combined effect of the 1940, 1957, and 1974 injuries. The Board also affirmed the Department's order requiring Chicago Bridge and Iron to pay to the pension reserve fund 100 percent of Mr. Nissen's pension. This order denied access to second injury fund relief to Chicago Bridge and Iron, a self-insured employer since 1971. (*See* App. pp. 17a-27a).

Before reviewing the subsequent court opinions, it is helpful to outline the legislative history behind the second injury fund before and after the 1974 injury. A schematic diagram of the legislative scheme and changes may be found in Appendix L, App. 45a.

## B. *Legislative History of the Washington Industrial Insurance Laws.*

To encourage hiring and retaining handicapped and previously disabled workers, the Washington Legislature in 1943 created a "second injury fund."[2] *Jussila v. Department*

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[2] At the time of Mr. Nissen's last injury in 1974, the second injury fund statute, RCW 51.16.120, stated:

> "Whenever a workman has sustained a previous bodily infirmity or disability from any previous injury or disease and shall suffer a further injury or disease in employment covered by this title and become totally and permanently disabled from the combined effects thereof, then the experience record of the employer at the time of said further injury or disease shall be charged only with the accident cost which would have resulted solely from said further injury or disease, had there been no preexisting disability, and which accident cost shall be based upon an evaluation of the disability by medical experts. The difference between the charge thus assessed to the employer at the time of said further injury or disease and the total cost of the pension reserve shall be assessed against the second injury fund."

Prior to 1972, the second injury fund was referred to as the "second injury account."

*of Labor and Industries,* 59 Wn.2d 772, 778, 370 P.2d 582 (1962). The second injury fund limits the liability of the employer where a previously handicapped or disabled worker is further injured resulting in a permanent total disability.[3] The fund thereby created a considerable economic incentive for all employers to hire handicapped or disabled workers. Professor Larson explained the role of the second injury fund as thus:

> The usual provision makes the employer ultimately liable only for the amount of disability attributable to the particular injury occurring in his employment, while the fund pays the difference between that amount and the total amounts to which the employee is entitled for the combined effects of his prior and present injury.

2 Larson, *Workmen's Compensation Laws,* §59.31(a) at 10-403.

Prior to 1971, all employers guaranteed payment of employee compensation by insuring with the State of Washington. The Department assessed premiums which were paid into the accident fund. RCW 51.16.035, RCW 51.44.010. When necessary, the Department would transfer funds from the accident fund to the second injury fund to defray charges against it. RCW 51.44.040.

In 1971, the Legislature amended the industrial insurance law,[4] and created a new category of employers defined in RCW 51.08.173 as "self-insurer". The Act authorized the Department to certify an employer as a self-insurer pursuant to RCW 51.14.020 and RCW 51.14.030 to assure that workers entitled to benefits will receive them. *Wash. State School Directors Ass'n. v. Department of Labor and Industries,* 82 Wn.2d 367, 376, 510 P.2d 818 (1973). To qualify as a self-insurer, the statutes require an employer to demon-

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[3] The following example is illustrative of the use of the second injury fund. Suppose a prospective employee has lost one eye in a previous injury. If the good eye is lost in a work-related injury, the person becomes a statutory pension case of perhaps $175,000. *See* RCW 51.08.160. The employer is charged only for the permanent partial disability for the loss of one eye (*e.g.* $21,600) and the balance of the pension comes from the second injury fund. A good explanation of how the second injury fund works is found in the United States Supreme Court case of *Lawson v. Suwannee Fruit & Steamship Co.,* 336 U.S. 198 (1949).

[4] Laws of 1971, First Extraordinary Session, Chapter 289.

strate financial ability to pay claims that might arise and to post a security deposit in the form of cash, securities or a bond. RCW 51.14.020(1)(2). As a condition to qualifying as a self-insurer, the legislation also required employers to pay their share of the deficit in the state fund. RCW 51.14.020(4).[5]

Despite the sweeping changes to many statutory provisions, the 1971 Act did not change the statutory provisions pertaining to the second injury fund. The section authorizing second injury fund relief to employers (RCW 51.16.120) remained unchanged, as did the section describing the fund. (RCW 51.44.040).[6] Moreover, the legislative history as recorded in the Journal of the Senate and Journal of the House fails to make any reference that RCW 51.16.120 would be changed or amended by the 1971 legislation.

The 1971 legislation did make changes in the way self-insurers would be charged for industrial insurance. Rather than assessments for premiums to be paid to the state accident fund (RCW 51.16.035), self-insurers would make direct payments to the employee and to the "reserve fund" (RCW 51.44.140). In addition, self-insurers would continue to be assessed for administrative costs on an annual basis. RCW 51.44.150.[7] In addition, the Department was authorized by RCW 51.14.010 and RCW 51.14.020(1) to make assessments on self-insurers for payments to the "state fund".

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[5] The Department issued regulations for calculating the payment of the deficit found at WAC 296-15-040.

[6] The 1971 Act did make minor changes to the definition of "employer" which are of no consequence to this case. The definition of employer is reproduced below in bill form so that the changes made in 1971 may be easily seen:

> "Employer" means any person, body of persons, corporate or otherwise, and the legal representatives of a deceased employer, all while engaged in this state in any [extrahazardous] work *covered by the provisions of this title*, by way of trade or business, or who contracts with one or more workmen, the essence of which is the personal labor of such workman or workmen, [in extrahazardous work].

RCW 51.08.070.

[7] The 1972 legislature amended RCW 51.44.040 and RCW 51.16.120. These changes did not affect the substance of second injury fund, however. (App. p. 36a, *infra*). The amendment to 51.44.040 created a new fund separate from the accident fund to be used for "defraying charges against

In 1977, at the request of the Department, the Legislature clarified self-insurers' rights to obtain second injury fund relief.[8] Senator Grant described the 1977 legislation as "primarily a housekeeping measure."[9] Specifically, RCW 51.16.120 was amended to explicitly provide for self-insured employers to participate in receiving second injury fund benefits.[10] The 1977 law thus marked the affirmation of the right of self-insurers to access the second injury fund.[11]

C. ***Decisions of the Courts Below.***

After the decision of the Board of Industrial Appeals, Chicago Bridge and Iron timely filed an appeal with the Superior Court of Washington for Okanogan County to have the second injury fund share the cost of Mr. Nissen's pension. At oral argument on the Motion for Summary Judgment, counsel for Chicago Bridge and Iron raised the issue of whether the 1971 legislation properly notified prospective self-insured employers that they would be ineligible for second injury fund relief.[12] The superior court ruled that since the self-insured employer had not contributed to the second injury fund between the period 1971 to 1974, it could not obtain second injury fund relief benefits for an injury in 1974 that led to permanent total disability. App. 15a-16a, *infra*. The judge also ruled the 1977 amendments did not have retroactive effect. App., *infra*, 16a.

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it as provided in RCW 51.16.120" and changed the name "second injury account" to "second injury fund." RCW 51.16.120 was amended to change the words "second injury fund" to correspond to the same change made in RCW 51.44.040.

[8] Laws of 1977, 1st ex. sess., ch. 323.

[9] 1977 Journal of the Senate, at 2188.

[10] The present version of RCW 51.16.120 is reproduced in Appendix K, *infra*, pp. 43a-44a.

[11] 1977 Journal of the Senate, at 2842.

[12] Counsel for Chicago Bridge and Iron raised the notice issue at three separate times during oral argument before the superior court:

"... you know, there was no information within the statute or anything else that upon becoming self-insured you would lose your right to second injury fund relief." (RP 15)

"They, the legislature, never said during this period you aren't covered. They changed the funding mechanisms, but they never changed the coverage." (RP 21)

Chicago Bridge and Iron filed a timely Motion for Reconsideration which expanded upon the constitutional issues. In a Memorandum Decision dated June 6, 1985, the court sustained its previous decision granting summary judgment for the Department. App., *infra,* 12a. The judge rejected Chicago Bridge and Iron's due process argument without comment. *Id.* at 13a. The superior court issued its Findings of Fact and Conclusions of Law on October 14, 1985, which Findings adopted the Findings of Fact contained in the Decision and Order of the Board of Industrial Insurance Appeals. App. C, *infra,* 9a. The corresponding Judgment was filed on October 14, 1985. App. D, *infra,* 11a.

On December 18, 1986, the Court of Appeals, Division III, of the State of Washington affirmed the decision of the superior court. App. A, *infra,* 1a. Addressing petitioner's claim that the 1971 amendments failed to provide sufficient notice, the court ruled that it is presumed that "one knows the law, and that adequate notice of statutory provisions is present when a sufficient amount of time has passed since its enactment." *Id.* at 5a.

Chicago Bridge and Iron filed a timely Petition for Discretionary Review with the Washington Supreme Court raising, *inter alia,* the issues of due process and equal protection under the U.S. Constitution. On March 3, 1987 the Supreme Court denied the Petition. App. B, *infra,* at 7a.

## REASONS FOR GRANTING THE PETITION

### A. *Summary of Argument.*

The analysis and decision of the Court of Appeals, Division III, is not supported by any constitutional provision, statute or judicial decision; is contrary to decisions from this court and other federal and state courts which have addressed whether vague state laws are constitutional; is contrary to the plain meaning of the 1971 legislation; and

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"Your Honor, we also go back to the, you know, the overall statement of the Act itself which says whenever a workman is injured this statute will control. Now, why don't we have then a proviso or an exception in the Act that says that if you chose to be self-insured in 1971, you're not going to be covered for these periods? Or why don't we have a proviso that says if you have an injury within the years 1971 through 1977, then you're not going to be covered by the Act? The Act is silent on that." (RP 18)

ignores the means and ability of employers to make informed hiring decisions based on prior precedent and established public policy. The decision also sanctions the unconstitutional assertion of legislative power by an administrative body. Finally, this case presents an important and substantial issue for state and federal courts which rely on statutory or common law presumptions to satisfy constitutional due process notice requirements.

The opinion of the Court of Appeals, Division III, begins by interpreting the second injury fund provisions of the 1971 legislation such that self-insurers are excluded from access to the fund. The court then used that analysis to bootstrap itself into a conclusion that there was no violation of due process. The court stated that Chicago Bridge and Iron was "presumed to know the law" (as interpreted by the court in 1986) at the time Chicago Bridge and Iron opted to become a self-insured employer in 1971. If Chicago Bridge and Iron had the prescience to predict how the 1971 amendments would affect self-insurers' access to second injury fund provisions, it would not be before this court now. A presumption that one knows the law is insufficient to satisfy the notice requirements for constitutional due process unless the statute itself can meet the minimum constitutional standard of clarity.

The constitutional standard for clarity (or vagueness) of statutes has been addressed by this court with regard to other constitutionally-protected rights.[13] This court has not articulated when a statute is sufficiently clear to satisfy the notice requirements of due process.

All persons are entitled to a fair statement of how a law will affect their property rights. While a presumption that one knows the law is appropriate when determining what conduct is proscribed or what rights are affected, people have a right to expect the plain meaning of a statute will control their conduct and rights. People should not have to wait for interpretive decisions by the courts. The burden should rest with the legislature to accurately and precisely address, define and determine the scope of its legislation when it intends to use the publication of the legislation as

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[13] *See, e.g., Lanzetta v. New Jersey*, 306 U.S. 451, 59 S.Ct. 618 (1939); *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 102 S.Ct. 1186 (1982).

notice of deprivation of property under the due process clause.

Business people need guidance from this court as to what extent they can be expected to know how legislation will affect them. If the approach of the court of appeals is allowed to stand, any business person who is uncertain about how legislation will affect his business must file a lawsuit to have that question decided by a court before he acts in reliance on that legislation. This will unnecessarily clog the courts with petitions for advisory opinions. In turn, the prudent, cautious businesses will spend enormous sums of money on litigation and incur frequent delays before it determines the scope of new legislation.

### B. *The 1971 Legislation Deprived Chicago Bridge and Iron of a Constitutionally-Protected Property Right.*

Every Washington State employer who hires a previously-disabled worker has the right to have the state pay a portion of that worker's statutory pension in the event he is totally disabled in a work related injury. The policy behind this law is to encourage all employers to hire handicapped workers. The 1971 legislation deprived Chicago Bridge and Iron of access to second injury fund assistance in paying a permanent disability pension when it became a self-insured employer.

#### 1. *An Employer's Right to Obtain Second Injury Fund Relief is a Property Right Protected by the Constitution.*

This court has proclaimed that "the hallmark of property . . . is an individual entitlement grounded in state law, which cannot be removed, except 'for cause'." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 102 S.Ct. 1148, 71 L. Ed.2d 265, 430 (1982), citing *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 98 S.Ct. 1554, 56 L. Ed.2d 30 (1978) 11-12 (1978). In *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L. Ed.2d 18 (1976), this court recognized that the interest of an individual in continued receipt of social security benefits is a statutorily created property interest protected by the Fifth Amendment. *Id.* at 332. In *Atkins v. Parker*, 472 U.S. 115, 105 S.Ct. 2520, 86 L. Ed.2d 81 (1985),

this court recognized that food stamp benefits for persons qualified to receive them are a form of property protected by due process. *Id.* at 2529. *See also Goldberg v. Kelly,* 397 U.S. 254, 90 S.Ct. 1011, 25 L. Ed.2d 287 (1970) (welfare benefits defined as protected property interest).

Chicago Bridge and Iron's right to second injury fund relief shares the same characteristics as the individual entitlement to social security disability benefits in *Mathews,* and to entitlement to food stamp benefits in *Atkins.* Prior to the 1971 legislation, all employers had a statutory right to share with the state second injury fund the pension costs for a permanently, totally disabled worker if that worker had been previously disabled. Chicago Bridge and Iron contributed to this fund on a regular basis when workers were injured. Workers with a previous disability carried this benefit from job to job. The right to obtain second injury fund relief was conferred on Chicago Bridge and Iron at the time they hired Nissen. Thus, Chicago Bridge and Iron was qualified to receive second injury fund relief, and any deprivation of that property right must comply with due process.

2. ***The 1971 Amendments Deprived Chicago Bridge and Iron Company of Their Right to Second Injury Fund Relief.***

The Court of Appeals Division deprived Chicago Bridge and Iron of its interest in second injury fund relief. The court of appeals relied upon the 1971 amendments which did not clearly state that self-insurers would have their property interest in the second injury fund terminated. In fact, the 1971 amendments made no distinction whatsoever between the right of self-insurers and state-insurers to receive second injury fund benefits. Although Chicago Bridge and Iron could have elected to remain a state-insured employer without a constitutional deprivation of property, that option is meaningless unless the employer may fully understand the ramifications of making that election and the implications of the legislation. *See Texaco, Inc. v. Short,* 454 U.S. 516, 542, 102 S.Ct. 781, 70 L. Ed.2d 738 (1982) (Brennan, J. dissenting). In *Texaco,* the dissent challenges the majority's failure to examine whether the two-year grace period for recording mineral interests provided adequate protection

for mineral interest owners whose interest lapsed by statute. According to the dissent, whether the two-year period provided a constitutionally sufficient option is crucial to protection of the property interest. Similarly, whether the 1971 amendments to the Washington Industrial Insurance Act sufficiently described the rights of the parties is crucial to whether Chicago Bridge and Iron could choose to protect their interests. A retrospective analysis of the 1971 amendments demonstrates that the legislature completely omitted any indication whatsoever that second injury fund relief would be terminated for self-insured employers. In turn, Chicago Bridge and Iron was prevented from making an informed and meaningful consideration of the newly created self-insurer program.

### 3. *Chicago Bridge and Iron was Entitled to a Fair and Meaningful Statement from the Legislature Informing Them that Second Injury Fund Benefits Would Terminate.*

This court has stated many times in the past that due process of law prohibits the deprivation of property without providing notice and an opportunity for a hearing appropriate to the case. *Mullane v. Central Hanover Trust Company,* 339 U.S. 306, 313, 70 S.Ct. 652, 94 L. Ed. 865 (1950); *Memphis Light, Gas & Water Division v. Craft,* 436 U.S. 1, 98 S.Ct. 1554, 56 L. Ed.2d 30 (1978); and *Ochoa v. Hernandez Y Morales,* 230 U.S. 139, 33 S.Ct. 1033, 57 L. Ed. 1427 (1913). This court recently restated and affirmed that the notice requirements may be satisfied by publication of a statute which changes the benefits or duration of a legislative entitlement program. *Atkins v. Parker,* 472 U.S. 115, 105 S.Ct. 2520, 2529, 86 L. Ed.2d 81 (1985). In *Atkins,* the court restated and affirmed the doctrine that "[a]11 citizens are presumptively charged with knowledge of the law." *Id.* at 2530. The presumption may not apply, however, when "the statute does not allow a sufficient 'grace period' to provide the persons affected by a change in the law with an adequate opportunity to become familiar with their rights and responsibilities under it." *Hodel v. Irving,* ____ U.S. ____ S.Ct. ____, ____ L. Ed.2d ____, ____. (No. 85-637 Decided May 18, 1987) (Stevens, J. Concurring, quoting *Atkins v. Parker,* 472

U.S. 115, 130).[14] The presumption that one knows the law has been justified as a matter of necessity. "As a practical matter, a State cannot afford notice to every person who is or may be affected by a change to the law." *Texaco, Inc. v. Short,* 454 U.S. 516, 544, 102 S.Ct. 781, 70 L. Ed.2d 738, 800 (1982), (Brennan, J. dissenting).

More importantly, however, the presumption that one knows the law does not apply where the law fails to provide a clear and meaningful description of the rights and responsibilities of the persons affected. As Justice Brennan observed in *Texaco,* "[t]he constitution puts even our most cherished legal maxims and presumptions to the test of fairness and rationality in light of common experience." *Id.* In this case, the court erred by applying the presumption despite the applicable legislation that was inherently ambiguous for failing to distinguish between self- and state-insured employers. This point is where the court of appeals erred. The court refused to examine the fairness and rationality of applying the presumption to self-insurers. The court failed to examine whether the 1971 legislation provided a meaningful and fair opportunity for self-insurers to know how their statutory benefits would change. This was error.

When a statute is challenged on the grounds that it is unconstitutionally vague, the presumption that one knows the law is not applicable. *See, e.g., Textile Workers Pension Fund v. Standard Dye and Finishing Co., Inc.,* 725 F.2d 843 (2nd Cir. N.Y., 1984); *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 102 S.Ct. 1186, 71 L. Ed.2d 363 (1982); *Lanzetta v. New Jersey,* 306 U.S. 451, 59 S.Ct. 618, 83 L. Ed. 888 (1939). The presumption does not apply in these circumstances since an "unfair and irrational exercise of state power cannot be transformed into a rational exercise merely by invoking a legal maxim or presumption." *Texaco, Inc. v. Short,* 454 U.S. at 544 *supra* (Brennan, J. dissenting).

The court of appeals erred by presuming Chicago Bridge

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[14] For example, in *Texaco v. Short,* 454 U.S. 516 (1982), owners of a mineral interest which lapsed under a statute terminating undeveloped mineral interests were not entitled to notice beyond publication of the statute of the actions that they could have taken during two-year statutory grace period to avoid extinguishment of their interest.

and Iron knew the 1971 amendments terminated self-insurers' rights to second injury fund relief. The court mistakenly applied the presumption since the 1971 amendments did not alter the statutory provisions which gave "the employer" access to second injury fund relief. In essence, the court of appeals charged the petitioners with knowledge of the court's retrospective analysis of the 1971 amendments. Chicago Bridge and Iron cannot be bound for notice purposes, by the interpretation later given by the court. See *Lanzetta v. New Jersey*, 306 U.S. 451, 59 S.Ct. 618, 83 L. Ed. 888 (1939); *See also*, Note, *Due Process Requirements of Definitions in Statutes*, 62 Harv. L. Rev. 77, 82 (1948).

### C. *Standards for Evaluating Vagueness of State Statutes.*

The decisions from this court make clear that civil and criminal statutes and regulations must be sufficiently clear such that persons who are affected can gain a reasonably clear idea of what the law requires of them. "Laws [must] give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L. Ed.2d 222 (1972). The court in *Grayned* explained the standards and rationale for this rule. First, clear laws provide fair warning of what the law requires, whereas vague laws may trap the innocent. Second, vague laws may lead to arbitrary and discriminatory determinations by police officers and regulatory officials. Third, uncertainty causes individuals to be extraordinarily more cautious than if the boundaries were clearly marked. *Id.* at 108-109.

Both the degree of clarity required and the relative importance of fair warning and discriminatory enforcement depend on the nature of the law in question. Laws regulating business behavior are held to a lesser standard of definiteness because businesses "can be expected to consult relevant legislation in advance of action." *Flipside*, 455 U.S. 489 at 498, 102 S. Ct. 1186, 71 L. Ed.2d 362, *rehearing denied*, 456 U.S. 950, 102 S.Ct. 2023, 72 L. Ed.2d 476 (1982) (footnote omitted). Greater specificity is required of laws imposing criminal penalties than of those infringing on constitutionally-protected rights. *Id.* at 498-499.

With respect to criminal laws, due process requires that

". . . a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." *McBoyle v. United States,* 283 U.S. 25, 27, 51 S.Ct. 340, 75 L. Ed. 816 (1931). One of the most important factors affecting the need for clarity that the Constitution demands of the law is whether the statute inhibits the exercise of constitutionally-protected rights. *Flipside,* at 499. Thus, where a law interferes with the right of free speech or association, a more stringent vagueness test has been applied. *Id.*

Chicago Bridge and Iron submits that the fundamental constitutional right not to be deprived of property without due process of law is at stake in this case and, therefore, the more stringent requirements for clarity should apply. Although the statute in this case governs entitlement to a statutory benefit, *i.e.,* right of access to the second injury fund, the notice by publication of the statute is analogous to the publication of a new welfare program in *Grueschow v. Harris,* 633 F.2d 1264 (8th Cir. 1980). There, the court applied a more stringent standard and required that "accurate information must be given so that those potentially eligible for the program can at least, upon hearing about the program, make a reasonable determination of their possible eligibility." *Id.* at 1267.

The opinion of the court of appeals conflicts with at least three cases which define the standards for when vague legislation violates due process. First, in *Chalmers v. City of Los Angeles,* 762 F.2d 753 (9th Cir. 1985), the Ninth Circuit held that contradictory ordinances governing vending activities created an inherently unclear standard which violated the plaintiff's constitutional due process rights. *Id.* at 758. The court agreed with the plaintiff's contention that two vending statutes — one that prohibited vending altogether, and a second which permitted vending under certain conditions — were vague and conflicting. The court held that the manner in which inconsistent ordinances were implemented and enforced deprived plaintiff of a constitutionally-protected liberty interest. *Id* at 758. However, the court specifically reserved the question presented by petitioners in the case at bar, *i.e.,* whether the existence of inconsistent legislation constitutes a violation of due process. *Id.* at 759.

Second, in *Village of Hoffman Estates v. Flipside,* 455 U.S. 489 (1982), this court upheld a city ordinance regulating the sale of drug paraphernalia. The court found that the pertinent ordinance language was not unconstitutionally vague on its face since the standards "designed for use" and "marketed for use" gave ample warning to a retailer that it would violate the law by displaying drug paraphernalia and drug literature in close proximity. The court noted that the standard for reviewing a business regulation for facial vagueness is "whether the law affords fair warning to what is proscribed." *Id.* at 503. Without evidence that the ordinance had been enforced in a discriminatory manner, the court found that the language of the ordinance was sufficiently clear that the speculative danger of arbitrary enforcement did not render the ordinance void for vagueness. *Id.*

In *Lanzetta v. New Jersey,* 306 U.S. 451, 59 S.Ct. 618 (1939), the court held a New Jersey statute making it a crime to be a "gangster" violated due process because of the vague uncertainty of the scope of the statute. The court explained that "[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of the penal statutes. All are entitled to be informed as to what the State commands or forbids." *Id.* at 453 (footnote omitted). The Second Circuit has stated the void for vagueness doctrine, though principally applied in criminal contexts, is also relevant to legislation imposing civil sanctions. *Boutilier v. Immigration and Naturalization Service, 363 F.2d 488, 495 (2nd Cir. 1966) aff'd* 387 U.S. 118, 87 S.Ct. 1563, 18 L. Ed.2d 661 (1967).

The court of appeals failed to recognize that the 1971 amendments were vague under the standards set forth in the foregoing uses. The presumption that one knows the law should not apply when the laws are vague.

D. *The Interpretation of the 1971 Statutes According to Established Standards of Statutory Construction Does Not Reasonably Apprise and Provide "Fair Warning" to the Informed Reader that the Second Injury Fund Relief is Eliminated for Self-Insurers.*

The starting point for analyzing ambiguous statutes is the "plain meaning" of the statute. *See United States v.*

Locke, 471 U.S. 84, 105 S.Ct. 1785, 1793, 85 L. Ed.2d 64 (1985) ("[g]oing behind the plain language of a statute in search of a possibly contrary congressional intent 'is a step to be taken cautiously' even under the best of circumstances", quoting *American Tobacco Co. v. Patterson*, 456 U.S. 63, 75, 102 S.Ct. 1534, 1540 (1982)). In addition, the entire statute must be read as a whole and the meaning must be ascribed to the various provisions to avoid strained or absurd results. *Standing v. Department of Labor and Industries*, 92 Wn.2d 463, 474, 598 P.2d 725 (1979).

1. ***RCW 51.16.120, as it Read in 1974, Indicated Self-Insurers Would be Entitled to Second Injury Fund Relief.***

In Washington, the law governing payment of workers' compensation benefits is based on the law in effect at the time the injury occurred. *Bodine v. Department of Labor and Industries*, 29 Wn.2d 879, 190 P.2d 89 (1948). At the time of Mr. Nissen's injury in 1974, the clear and plain language of RCW 51.16.120 provided that: (1) "the employer" at the time of the injury would be charged only for the second further injury. Nothing in the entire statute limited second injury fund benefits to a certain class of employers, state-insured or self-insured; (2) the employer is entitled to second injury relief "whenever" total disability results from the combined effects of injury.

The decision of the court of appeals would read the phrase "the employer" in RCW 51.16.120 to mean "the state-insured employer". That reading is unsupported by the statutory definition of employer, which, by law, controls the meaning of statutory words. RCW 51.08.010; *See Lawson v. Suwannee Fruit and Steamship Co.*, 336 U.S. 198, 201, 69 S.Ct. 503, 93 L. Ed. 611 (1949). The statutory definition of "employer" in RCW 51.08.070 makes no distinction between self-insured and state-insured employers. Chicago Bridge and Iron was "the employer" of Mr. Nissen when his injury occurred. Thus, the plain meaning of the statute entitled Chicago Bridge and Iron to second injury fund relief.

The workmen's compensation law in 1974 did not specifically state any time period that a self-insured employer would not be entitled to second injury fund relief. On the contrary, RCW 51.16.120 provided that an employer is en-

titled to second injury fund relief "whenever" there is a total and permanent disability from the combined effect of previous injuries or disability. Any employer interpreting the plain meaning of this provision in 1974 would be quite satisfied that the question of a self-insured employer's entitlement to second injury fund relief was not changed by the 1971 amendments. Nothing in RCW 51.16.120 provided "fair warning" that second injury fund benefits had terminated in 1971.

2. ***Changes to the Second Injury Fund Assessment are Insufficient to Provide Meaningful Notice of Benefit Changes.***

Although the 1971 amendments also changed the funding mechanism for the second injury fund, that change, by itself, cannot provide sufficient constitutional notice that benefits to the fund would no longer be available. First, the funding and assessment chapter (RCW 51.44) is entirely separate from the payment chapter (RCW 51.16). Moreover, the plain reading of the statute demonstrates that RCW 51.14.010 and RCW 51.14.020 (1) subjected self-insured employers to future assessments to the "state fund". Presumably, these assessments could have been made for the second injury fund. *See* RCW 51.08.175. Although Chicago Bridge and Iron admittedly did not make payments directly to the second injury fund between 1971 and 1974, that fact cannot provide "notice" under the due process clause that second injury relief had been terminated during the period 1971 to 1974. The plain meaning of RCW 51.44.040 authorizes the Department to make assessments as necessary to keep self-insurers current with the state fund. Thus, it was the obligation of the Department, not Chicago Bridge and Iron Company, to insure that adequate payments to the fund were made. It is patently unfair to penalize Chicago Bridge and Iron Company for the Department's failure to make assessments.

Moreover, RCW 51.14.020(4) provides that an employer must pay "any deficit or insufficiency in the state fund" in order to qualify for self-insurance. This deficit payment sensibly means that a self-insurer has been assessed for and paid its fair share of *previous* injuries to its employees. Thus, any employee with a previous injury at the time Chicago

Bridge and Iron became self-insured would carry with him throughout the term of his employment the right for Chicago Bridge and Iron to gain access to the second injury fund for any injury resulting in permanent, total disability. In light of the foregoing, reasonable and salutory construction of the statutes, the obscure changes in second injury funding cannot reasonably apprise self-insurers that second injury fund benefits would be terminated.

### 3. *To Deny Second Injury Fund Relief to Self-Insurers Would Lead to Absurd Results.*

Another fundamental principle of statutory construction is that statutes must be construed to avoid absurd results. *Standing v. Department of Labor and Industries*, 92 Wn.2d 463, 598 P.2d 725 (1979) at 474. The absurd consequences of the court of appeals' interpretation of the statute is demonstrated by the following example which further evidences the fact that the statute provided no notice that the second injury fund relief would be denied to self-insurers. If Mr. Nissen had sustained his last injury on the day after Chicago Bridge and Iron became a self-insured employer, it would not be entitled to second injury relief, even though it had paid into the state fund right up until the time of the last injury. Chicago Bridge and Iron would be responsible for the entire statutory pension (an amount that could exceed $100,000) even though other employers had paid premiums for the first and/or second injuries and even though Chicago Bridge and Iron had made deficit payments to cover those previous injuries. This leads to an absurd result since the employer at the time of the last injury cannot recoup its entitlement from the second injury fund once it is self-insured. Thus, a self-insured employer is unreasonably forced to pay for the total pension of any and every previously-handicapped worker. The Washington State second injury fund gains at the expense of the self-insured employer.

### 4. *Public Policy Favoring Hiring and Retaining Handicapped Workers Indicates Self-Insurers are Entitled to Second Injury Fund Relief.*

Finally, an informed examination of the 1971 amendments in light of the prior case law and public policy favor-

ing the hiring of handicapped and previously-disabled workers indicates the Washington legislature had not intended to eliminate second injury fund benefits to self-insured employers. In the Washington Supreme Court's first interpretation of RCW 51.16.120, the court recognized that the second injury fund was set up "to encourage the hiring of previously handicapped workmen by providing that the second employer will not, in the event such a workman suffers a subsequent injury on the job, be liable for a greater disability than actually results from the second accident." *Jussila v. Department of Labor and Industries*, 59 Wn.2d 772, 778, 370 P.2d 582 (1962). The court further recognized that "[i]t is apparent that any rule which makes it easier for an employer to obtain reimbursement from the fund will tend to support the basic purpose of the fund. Conversely, if recovery from the fund is too difficult, an employer may find it easier and less costly simply to refuse to hire previously disabled persons." *Id.* at 779. *See also, Lawson v. Suwannee Fruit and Steamship Co.*, 336 U.S. 198 (1948). An informed statute reader would recognize that an interpretation of RCW 51.16.120 which would deny second injury fund relief to self-insured employers would discourage the hiring and retention of handicapped workers. Such interpretation would be contrary to anti-discrimination statutes which, by law, must be liberally construed. *Marine Power and Equipment Company v. Washington State Human Rights Commission Hearing Tribunal*, 39 Wn. App. 609, 694 P.2d 697 (1985), *citing* 3 C. Sands, *Statutory Construction*, §72.05 at 392 (4th ed. 1973).

People have the right to depend upon established principles of statutory construction and the plain meaning of statutory words, the need to construe the statute to avoid absurd results and the consideration of the underlying policy behind the statute. When these factors are considered as a whole there can be only one conclusion: the Industrial Insurance Amendments in 1971 were wholly inadequate and insufficient to fairly apprise the informed reader that second injury relief would be unavailable to self-insurers. Employers throughout the state relied upon these principles of statutory construction in deciding to become self-insured.

As interpreted by the court of appeals, the 1971 amendments deprived Chicago Bridge and Iron Company of an

accrued property interest without due process. Constitutional fairness to citizens requires that those who create laws must deal fairly with its citizens and not mislead them as to their rights. *Breath v. Cronvich,* 729 F.2d 1006, 1013 (5th Cir. 1984), *rehearing denied,* 734 F.2d 225 (1984) *cert. denied,* 469 U.S. 934, 105 S.Ct. 332, 83 L. Ed.2d 268 (1984) (Williams, J., dissenting). The 1971 Amendments failed to inform self-insurers of their loss of second injury fund relief in violation of due process.

### E. *The Importance of this Case is Not Affected by the 1977 Amendments to the Industrial Insurance Act.*

In 1977, the legislature amended RCW 51.16.120, to clarify the ambiguity in that statute which has brought this case before the court. That change, however, does not mean that this case is merely episodic with no chance for recurrence. Under the Industrial Insurance Act, *see* RCW 51.28.040, an employee whose last injury occurred between 1971 and 1977 may continue to keep his claim open for an indefinite period. Although the window of ambiguity has been closed, the potential for additional and recurring claims against self-insurers for entire statutory pensions is by no means over. Chicago Bridge and Iron and other employers will still be responsible for a permanent pension where the last injury occurred between 1971 and 1977.

This case also raises important and substantial questions that transcend the narrow issue between the parties. Federal, state and local legislative bodies all will benefit from the court's examination and standards for clarity for determining when presumptions in the law may provide sufficient notice under the due process clause. *See, e.g., Breath v. Cronvich* 729 F.2d 1006 (5th Cir. 1984) (publishing statutory procedures for filing appearance bond sufficient notice for redeeming illegally parked car); *Solberg v. Secretary of Department of Health and Human Services,* 583 F.Supp. 1095 (E.D. Wis. 1984) (presumption that mailed notice for termination of disability benefits had been duly delivered); *United States v. Belgrave,* 484 F.2d 915 (3rd Cir. 1973) (presumption of receipt of notice upon evidence of mailing may be overcome by shifting burden of proof to government).

F. ***The Decision of the Court of Appeals Sanctions the Unconstitutional Assertion of Power by the Department of Labor and Industries.***

The Department construed the 1971 Amendments to exclude self-insured employers. That construction was contrary to the express legislative and judicial policy behind the fund. That construction also was made without any authority from the Washington legislature.

The decision of the court of appeals wrongfully upholds the Department's assertion of power to eliminate Chicago Bridge and Iron's property interest in the second injury fund. The legislative delegation of power to an administrative agency must have clear and precise standards to avoid arbitrary and whimsical rules and regulations. *City of Eastlake v. Forest City Enterprises,* 426 U.S. 677, 675, 96 S.Ct. 2358, 2363, 49 L. Ed.2d 132 (1976). No precise standards for authorizing the Department to eliminate second injury fund relief to self-insurers is found in the 1971 Amendments. Without precise standards, the action by the Department to eliminate second injury fund benefits is an unconstitutional assertion of legislative power. *See Thompson v. Smith,* 154 S.E. 579 (Va. 1930).

## CONCLUSION

The petition for a writ of certiorari should be granted and the judgment should be reversed.

Respectfully submitted this 1st day of June, 1987.

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## APPENDIX A

COURT OF APPEALS OF THE
STATE OF WASHINGTON, DIVISION III

No. 7810-8-III

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CHICAGO BRIDGE AND IRON COMPANY,
Appellant,

vs.

THE DEPARTMENT OF LABOR AND INDUSTRIES, et al.,
Respondents.

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[Filed December 18, 1986]

Green, C.J. — Chicago Bridge & Iron Company (CBI), a self-insured employer, appeals an order denying it second injury fund relief and requiring CBI to deposit into the pension reserve fund 100 percent of Rex T. Nissen's pension. The issue presented is whether a self-insured employer is entitled to second injury fund relief when one of its employees becomes permanently and totally disabled from the combined effects of three injuries, two of which occurred prior to certification of the employer as a self-insurer, and the other injury occurring after certification of self insurance, but before the 1977 amendment to the Industrial Insurance Act which expressly provides self-insured employers with second injury fund benefits.

Mr. Nissen is a 61-year-old male who throughout his adult life engaged in heavy physical labor in the construction industry. He has suffered three major injuries: (1) May 11, 1940, he crushed his fourth, fifth, sixth, and seventh cervical vertebrae in a rodeo accident; (2) October 7, 1957, his eighth and ninth cervical vertebrae were crushed when he threw a 50-pound toolbox onto his shoulder while working in Montana; and (3) February 25, 1974, he developed severe, chronic psychogenic pain disorder and severe retroactive depression with suicidal ruminations from an accident which occurred during the course of his employment at Coulee Dam for CBI. A co-worker was killed in this accident.

After his last injury, Mr. Nissen applied for benefits with

the Department of Labor and Industries (DLI). The claim was allowed and in June 1975 closed with an award for 20 percent permanent partial disability. The claim was reopened and closed several times thereafter. On August 24, 1982, DLI issued an order finding that due solely to conditions related to the February 25, 1974 injury, Mr. Nissen was permanently and totally disabled. On the same day, DLI issued a separate order directing CBI to transmit to DLI 100 percent of the reserve amount required to pay the pension. CBI, a self-insured employer since 1971, appealed.

On November 2, 1983, the Board of Industrial Insurance Appeals concluded that due to the combined effect of his 1940, 1957, and 1974 injuries, Mr. Nissen was permanently totally disabled. It affirmed DLI's order requiring CBI to deposit into the pension reserve fund 100 percent of Mr. Nissen's pension, which in effect denied CBI second injury fund relief. On December 6, 1983, CBI appealed the Board's decision which was affirmed by the Okanogan Superior Court. CBI's direct appeal to the Supreme Court was transferred to this court for disposition. We affirm.

For many years prior to 1971, all employers in the State of Washington were state insured. During that time, RCW 51.16.120 established and there existed a "second injury fund". Premiums were paid to the accident fund by employers and a portion transferred to the second injury fund. The purpose of the fund was to relieve employers from the full financial responsibility for an employee's permanent total disability or death resulting from the combined effect of a previous injury or disability and an on-the-job injury. *T.I.M.E.—D.C. v. Schuirman,* 42 Wn. App. 607, 609, 711 P.2d 1116, *review denied,* 105 Wn.2d 1014 (1986). This provision encouraged the hiring of previously handicapped workers by limiting the liability of the second employer to disabilities incurred on the job for that employer. *Jussila v. Department of Labor & Indus.,* 59 Wn.2d 772, 370 P.2d 582 (1962).

In 1971, RCW 51.14 was enacted allowing qualified employers to elect to become self-insurers, thus permitting them to manage their own industrial insurance matters including authorization of medical care and payment of compensation. RCW 51.14.030. Immediately thereafter, CBI made such election. No provision was made for self-

insured employers to participate in the second injury fund. Subsequently, on July 1, 1977, RCW 51.16.120 and RCW 51.44.040 were amended to allow second injury fund relief for self-insurers. Since the amendment, RCW 51.16.120(2) provides that where a previously disabled employee suffers a further on-the-job injury and the combined effects of the injuries result in permanent total disability, "a self-insured employer shall pay directly into the reserve fund only the accident cost which would have resulted solely from said further injury or disease . . ."; and RCW 51.44.040(3) provides an assessment for the second injury fund shall be imposed on self-insurers to ensure they pay into the fund in proportion to the payments made from the fund on account of claims made against them. Until these amendments were effective, the second injury fund was financed by premiums paid by employers into the accident fund on the basis of their experience rating. RCW 51.44.040. Only state-insured employers paid into the accident fund and DLI was only required to maintain "experience ratings" on state-insured employers. Thus, for the period 1971 through 1977, CBI was not required and did not make any contributions to the accident or second injury funds. Notwithstanding, CBI contends it is entitled to second injury fund relief.

[1] In *T.I.M.E.—D.C. v. Schuirman, supra,* this identical issue was raised and decided contrary to CBI's position. T.I.M.E.—D.C., the employer, elected to be a self-insurer. Schuirman, the worker, became permanently totally disabled as a result of a combination of his 1959 and 1977 injuries which occurred prior to the 1977 amendment to the Industrial Insurance Act. The trial court directed DLI to provide second injury fund relief. The appellate court reversed, holding at page 610:

> By withdrawing from the established scheme of funding workmen's compensation benefits by regular payment of premiums and becoming a self-insurer, T.I.M.E.—D.C. removed itself from coverage. Because it did not pay into the second injury fund, it acquired no right to benefit therefrom.

The Supreme Court denied review in *T.I.M.E.—D.C. v. Schuirman, supra,* and a companion unpublished decision, *Allied Stores, Inc. v. Department of Labor & Indus.*, 42 Wn.

App. 1054, *review denied*, 105 Wn.2d 1016 (1986). In light of the decision in T.I.M.E.—D.C., we hold CBI is not entitled to second injury fund relief.

Neither do we accept CBI's contention that the amendments to RCW 51.44.040 and RCW 51.16.120 are retroactive. To permit retroactive application of these amendments in order to allow CBI access to the second injury fund when it had not paid into either it or the accident fund would arguably interfere with the interests of state-insured employers who had contributed to the funds. *Hearde v. Seattle*, 26 Wn. App. 219, 221-22, 611 P.2d 1375 (1980). Further, it would allow payments from a fund to which CBI had not regularly contributed — contrary to the provisions providing for funding.

CBI next contends it will be denied equal protection of the law if it is not given second injury fund relief for Mr. Nissen's prior injuries. CBI argues there is no reasonable basis for classifying self-insured employers differently than state-insured employers for purposes of administering the second injury fund. We disagree.

[2] The constitutional safeguards for equal protection are offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. *Haddenham v. State*, 87 Wn.2d 145, 150, 550 P.2d 9 (1976). A legislative enactment is presumptively valid, *Haddenham*, at 150, and the party challenging a classification bears a heavy burden of proving it is unreasonable. *State ex rel. Graham v. San Juan Cy.*, 102 Wn.2d 311, 322, 686 P.2d 1073 (1984). Classifications may not be " 'manifestly arbitrary, unreasonable, inequitable, and unjust' "; instead reasonable grounds must exist for making the distinction between those within and those without the class. *Johnson v. Tradewell Stores, Inc.*, 95 Wn.2d 739, 744, 630 P.2d 441 (1981) (quoting *State ex rel. O'Brien v. Towne*, 64 Wn.2d 581, 583, 392 P.2d 818 (1964)). This is called the rational basis test. Use of the test involves a 3-step inquiry: whether (1) the classification applies alike to all members within the designated class; (2) some basis in reality exists for reasonably distinguishing between those within and without the designated class; and (3) the challenged classifications have any rational relation to the purposes of the challenged statute. *Myrick v. Board of Pierce Cy. Comm'rs.*, 102 Wn.2d 698, 701,

677 P.2d 140, 687 P.2d 1152 (1984). The rational relationship test must be applied here. See *Johnson v. Tradewell Stores, Inc., supra; Sanchez v. Department of Labor & Indus.*, 39 Wn. App. 80, 88-89, 692 P.2d 192 (1984).

Applying that test, we find: Step 1 — all self-insured employers are treated alike. None could receive second injury fund relief for employees injured between 1971 and 1977. Step 2 — the distinction between self-insured and state-insured employers is (a) self-insured employers choose to be classified as such voluntarily, (b) self-insured employers have not paid into the second injury fund, and (c) by definition "self-insurer" means that the employer will be responsible for any injuries to the employees. Step 3 — the purpose of the statute allowing employers to become self-insurers is to give employers a choice. Thus, we conclude there is a reasonable basis for distinguishing between state-insured and self-insured employers and CBI has not been denied equal protection of the law.

CBI further contends DLI has deprived it of a significant property interest by denying it access to the second injury fund for accident costs attributable to Mr. Nissen's pre-existing injuries without giving CBI any prior notice of its intent. CBI also argues it had an accrued vested interest in the second injury fund during 1971-77 for contributions made prior to 1971. We disagree.

[3] CBI's first argument with respect to notice is without merit. The wording of the former RCW 51. 16.120 is clear that the second injury fund was financed by premiums paid by employers into the accident fund on the basis of their experience rating. As stated before, only state-insured employers paid into the accident fund and were rated for their experience. When CBI chose to become a self-insurer, it removed itself from the benefits and coverage provided by the statutory scheme of funding workers' compensation. *T.I.M.E.—D.C. v. Schuirman, supra* at 610. There is a presumption one knows the law, and adequate notice of statutory provisions is present when a sufficient amount of time has passed since its enactment. *Department of Ecology v. Abbott*, 103 Wn.2d 686, 694 P.2d 1071 (1985). Mr. Nissen's injury occurred nearly 3 years after RCW 51.14 was enacted allowing qualified employers to become self-insurers, and he was declared by DLI to be permanently totally disabled

in 1982, 11 years after the statute was enacted.

Finally, CBI contends it had a vested property interest in the second injury fund because it had paid its fair share into the fund, and since it was subject to assessments for the fund between 1971 and 1977, it should not be penalized because the state failed to assess self-insured employers during that period of time. CBI supports this position based on RCW 51.14.020(4):

> If the employer seeking to qualify as a self-insurer has previously insured with the state fund, the director shall require the employer to make up his or her proper share of any deficit or insufficiency in the state fund as a condition to certification as a self-insurer.

We disagree. The payment required by this statute from an employer seeking to become a self-insurer does not constitute a payment into the fund for coverage of future injuries; rather it requires an employer to make up for any existing deficits in its account with the state fund before it can become a self-insurer. Thus, contrary to CBI's argument, the payment it made when it elected to become a self-insurer was not for the purpose of providing second injury fund relief after it became a self-insurer.

Furthermore, this provision did not require CBI to pay into the second injury fund between the years of 1971 and 1977. As stated previously, RCW 51.44.040(2) provided that payments to the second injury fund were to be made from the "accident fund". Only state-insured employers contribute to the accident fund. Thus, from 1971 until 1977, when the Legislature amended RCW 51.44.040 to include assessments upon self-insured employers for the second injury fund, such employers did not contribute to the fund and the state treasury did not have authority to assess self-insured employers for contributions to that fund. Thus, we hold CBI has not been deprived of a significant property interest in violation of its constitutional due process rights.

Affirmed.

McINTURFF and THOMPSON, JJ., concur.

## APPENDIX B

SUPREME COURT OF THE STATE OF WASHINGTON

No. 53513-2

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CHICAGO BRIDGE AND IRON COMPANY,
Petitioner,

vs.

DEPARTMENT OF LABOR AND INDUSTRIES, et al.,
Respondents.

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[Filed March 3, 1987]

PETITION FOR REVIEW OF A DECISION OF THE COURT OF APPEALS, DECEMBER 18, 1986, 46 Wn. App. 252.

*Denied* March 3, 1987

## APPENDIX C

SUPERIOR COURT OF WASHINGTON
FOR OKANOGAN COUNTY

No. 26144

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CHICAGO BRIDGE AND IRON COMPANY, a corporation,
Plaintiff,

vs.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, and REX T. NISSEN,
Defendants.

---

[Filed October 14, 1985]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDERS ON MOTIONS

### PRELIMINARY STATEMENT

This matter came on regularly before the Honorable James R. Thomas, Judge of the Superior Court of Okanogan County, on December 21, 1984, on motion of the Plaintiff for Summary Judgment and countermotion of the Defendants for the same, on appeal of the Plaintiff from a November 2, 1983 Order of the Board of Industrial Insurance Appeals (Board) of the State of Washington. The Plaintiff is represented by Witherspoon, Kelley, Davenport & Toole, P.S., per Kristine A Chrey, attorney; and the Department is represented by Kenneth O. Eikenberry, Attorney General, per Maureen A. Mannix, Assistant.

The Court entertained the following arguments and motions (with supporting briefs) of counsel:

1) December 20, 1984 — motion and oral argument for Summary Judgment by plaintiff;

2) December 20, 1984 — countermotion and oral argument for Summary Judgment by defendant;

3) January 30, 1985 — oral argument for presentment of Findings of Fact and Conclu-

sions of Law, and Judgment by defendant;

4) January 30, 1985 — Motion for Reconsideration by plaintiff.

The Court, having heard oral argument of counsel, and after considering the supporting briefs and memorandum, submitted in support thereof, the Affidavit of Kristine A. Chrey, dated October 3, 1984, the Transcript and Trial Exhibits referred to and all Exhibits thereto which constitute the entire record below and of the Board, issued a Memorandum Decision Granting Motion for Reconsideration and Sustaining Previous Decision Granting Summary Judgment in Favor of Defendants dated June 6, 1985, *affirming its oral decision of December 20, 1984*. This Decision granted CBI's Motion for Reconsideration but upon reconsideration the Court granted the Defendant a Summary Judgment in its favor and denied the Summary Judgment Motion of CBI.

The Court, now, hereby makes its:

## FINDINGS OF FACT

There is no genuine issue of material fact in this case and a motion for Summary Judgment has been made by both parties. This Court hereby sets forth the undisputed ultimate facts:

1) The Court finds that the Board of Industrial Insurance Appeals' Findings of Fact as stated in this November 2, 1983 Decision and Order are accurate and fully express this Court's factual findings. The Findings of Fact contained in the Board of Industrial Insurance Appeals' November 2, 1983 Decision and Order are hereby adopted as this Court's own findings and are incorporated herein by this reference as though fully set forth.

2) There is no just reason for delay of entry of judgment.

From these Findings of Fact the Court hereby makes its:

## CONCLUSIONS OF LAW AND ORDERS

1) The Court has jurisdiction over the parties and the subject matter of this proceeding.

2) The Board of Industrial Insurance Appeals' Order of November 2, 1983 is correct and should be affirmed in all

respects. The entire Order is adopted by this Court as its own Order and Conclusion of Law, and the entire Order is incorporated herein by this reference as though fully set forth.

3) The Memorandum Decision of the Court dated June 6, 1985 is incorporated herein by this reference as though fully set forth.

4) The Motion for Reconsideration brought by Chicago Bridge and Iron is granted but upon reconsideration the Summary Judgment Motion of Chicago Bridge and Iron is denied and the Summary Judgment Motion brought by the Department of Labor and Industries of the State of Washington is hereby granted.

5) A Judgment should issue granting the Summary Judgment of the Defendant Department of Labor and Industries of the state of Washington and dismissing the Complaint of Chicago Bridge and Iron. This Judgment should be final upon entry as there is no just reason for delay of entry of judgment in this matter.

DONE IN OPEN COURT this 14th day of October, 1985.

/s/ JAMES R. THOMAS

JAMES R. THOMAS, JUDGE

## APPENDIX D

SUPERIOR COURT OF WASHINGTON
FOR OKANOGAN COUNTY

No. 26144

---

CHICAGO BRIDGE AND IRON COMPANY, a corporation,
Plaintiff,

vs.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, and REX T. NISSEN,
Defendants.

---

[Filed October 14, 1985]

### FINAL JUDGMENT DISMISSING CBI'S COMPLAINT

The Court having heretofore entered its Findings of Fact and Conclusions of Law in the above-entitled case; NOW THEREFORE,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1) That the Order of the Board of Industrial Insurance Appeals dated November 2, 1983 be and the same is hereby affirmed in all respects.

2) That the Defendant, Department of Labor and Industries, be and hereby is granted a Summary Judgment in its favor, and the Summary Judgment Motion brought by CBI is hereby denied.

3) The Complaint of Chicago Bridge and Iron is dismissed.

4) This Judgment shall be final upon entry; there is no just reason for delay of entry of Judgment.

DONE IN OPEN COURT this 14th day of October, 1985.

/s/ JAMES R. THOMAS
JAMES R. THOMAS, JUDGE

## APPENDIX E

SUPERIOR COURT OF WASHINGTON
FOR OKANOGAN COUNTY

No. 26144

---

CHICAGO BRIDGE AND IRON COMPANY, a corporation,
Plaintiff,

vs.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, and REX T. NISSEN,
Defendants.

---

[Filed June 6, 1985]

## MEMORANDUM DECISION GRANTING MOTION FOR RECONSIDERATION AND SUSTAINING PREVIOUS DECISION GRANTING SUMMARY JUDGMENT IN FAVOR OF THE DEFENDANTS

### MATTERS CONSIDERED

1) Chicago Bridge and Iron Company's memorandum in support of motion for reconsideration and cases therein cited.

2) Department of Labor and Industries memorandum in opposition to motion for reconsideration and cases therein cited.

3) Chicago Bridge and Iron Company's reply to defendants' memorandum in opposition to plaintiff's motion for reconsideration.

### HOLDING OF COURT

The court grants the motion for reconsideration, however, upon reconsideration reinstates its original decision granting summary judgment in favor of the Department of Labor and Industries.

### RATIONALE

The court accepts the state's statement as to the real issue: "Whether or not RCW 51.16.120 may be given retro-

active treatment to allow Second Injury Fund Relief to those self-insured employers for successive injury occurring between 1971 and 1977."

It is to be noted that the pre-existing injury occurred prior to 1971. We thus have the situation of Chicago Bridge and Iron being a participant in the Second Injury Fund up to 1971. However, upon becoming self-insured, Chicago Bridge and Iron ceased to be a member of the Second Injury Fund by virtue of its not being able to and not contributing any funds thereto and its election to become self-insured. It again became a member of the Second Injury Fund pursuant to 1977 legislation.

To accept the position of Chicago Bridge and Iron that payment into the Second Injury Fund prior to 1971 gave it coverage therein until the corrective legislation of 1977 is not well taken. Let us assume, *arguendo,* that the 1977 legislation never occurred. The argument of Chicago Bridge and Iron would then be that they continued to participate in the Second Injury Fund forever. There would have been no way for the state to assess costs therefore against Chicago Bridge and Iron. Such a position is not acceptable. The entire program of compensation to workmen injured in the course of their employment is quite similar to an insurance program. The costs thereof are to be funded by employers.

By making the election subsequent to 1971 to become self-insured, Chicago Bridge and Iron effectively forfeited its involvement in the Second Injury Fund.

The court agrees that failure of Chicago Bridge and Iron to employ previously injured workers would have frustrated the purpose behind the establishment of a Second Injury Fund. It is quite likely that such frustration of purpose was the reason for the 1977 legislation. However, the "hiatus period" election to employ previously injured workers and the burden to pay for subsequent injury falls upon the self-insured employers and not upon the Second Injury Fund.

The time of injury is the time of injury to the workmen, i.e. 1974. The court does not accept the equal protection and due process consideration as being applicable to the matter at bar.

The 1977 amendment does not operate retroactively.

Dated this 6th day of June, 1985.

/s/ JAMES R. THOMAS

JAMES R. THOMAS, JUDGE

## APPENDIX F

SUPERIOR COURT OF WASHINGTON
FOR OKANOGAN COUNTY

No. 26144

---

CHICAGO BRIDGE AND IRON COMPANY, a corporation,
Plaintiff,

vs.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, and REX T. NISSEN,
Defendants.

---

[Reported December 20, 1984]

### ORAL DECISION OF THE COURT ON MOTION FOR SUMMARY JUDGMENT

THE COURT: I appreciate your arguments. And, as I've already said, I think the briefs were well done. You presented your positions quite well.

However, I'm going to sustain the Department. And my reasons are — I think were telegraphed somewhat in the questions. The — Ms. Chrey, I pronounced it wrong the first time, I'm sorry. How do you pronounce it?

MS. CHREY: Chrey.

THE COURT: Chrey. I'm sure other people have made that a soft 'C'. But the — when you make the date as firm as you do in your argument, I must accept that, I guess, that the effective date of coverage for secondary injury relief fund is 1974, I guess, when he was last injured. You just weren't part of it at that time. You had not contributed to it. You had not, as I've already indicated, Chicago Bridge and Iron had not paid the premium. They can't dance if they don't pay the piper, I think is one of our little homilies that we use.

It presents me with a — two or three other problems I would like a comment on. Chicago Bridge and Iron made an election, they made an election under the law as it existed. I can readily accept that the legislature made a mistake in their treatment of self-insured employers, vis-a-vis, their

relationship to the second injury relief fund. But then Chicago Bridge and Iron went on and elected to become self-insured and from that point on did not contribute to the fund, I assume, again until 1976 — or '77. Assuming that they have now or are still self-insured, which of course is just an assumption and interesting, it has nothing to do with what we're talking about today. I don't believe the legislature in passing the '77 act intended to pick up that hiatus period. I think it would be highly in error for a court to put that into the legislature without any words indicating that or the fact that they had — the legislature had, without contributions to the fund from the self-insured employers, agreed that the State would pick up those workers previously injured. That's not a reasonable interpretation.

So I will sign findings and I presume an order granting summary judgment on behalf of the State. Those can be presented by mail and we can have a phone conference if there's a problem about wording. It's quite often done. Make arrangements with Peggy, she sets up the calendar. Here are the numbers if you want them.

MS. MANNIX: Thank you.

MS. CHREY: Thank you, Your Honor.

MS. MANNIX: Thank you very much.

THE COURT: I guess I can't add much. I think we've discussed it pretty thoroughly. I really wonder if the date argument is not more of a problem. I have trouble figuring out what happened. Mr. Nissen was covered between 19 — in 1957 and '58 and '59 and '60 and on beyond into 19 — Chicago Bridge and Iron was covered in those periods, but if we accept the fact that the operative date and when we interpret it is in 1974, they weren't covered. That presents a real problem to me, but counsel or some other court will have to deal with that. Okay, that's it. I'm sure I have other matters.

## APPENDIX G

BEFORE THE BOARD
OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

Nos. 63214 and 63215

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In Re REX T. NISSEN,
Claim No. 13373

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[Filed November 2, 1983]

## DECISION AND ORDER

Docket No. 63214 is an appeal filed by the self-insured employer, Chicago Bridge and Iron Co., on October 18, 1982, from an order of the Department of Labor and Industries (Department) dated August 24, 1982, which effective January 8, 1979 classified the claimant permanently and totally disabled as a result of his February 25, 1974 injury. The Department order is reversed in part and remanded.

Docket No. 63215 is an appeal filed by the employer on October 18, 1982 from a second Department order dated August 24, 1982, which required the employer to deposit into the pension reserve fund 100% of the dollar amounts necessary to provide Mr. Nissen with the pension to which he is entitled. The Department order is affirmed.

### PROCEDURAL STATUS AND EVIDENTIARY RULINGS

Pursuant to RCW 51.52.104 and RCW 51.52.106, these matters are before the Board for review and decision on a timely Petition for Review filed by the employer to a Proposed Decision and Order issued on July 8, 1983, in which the appeal assigned Docket No. 63215 was dismissed, and the order which was appealed under Docket No. 63214 was affirmed.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed. Said rulings are hereby affirmed.

## DECISION

The issues presented by these appeals and the evidence presented by the parties are adequately set forth in the Proposed Decision and Order.

The employer's Petition for Review to this Board essentially admits that the claimant, Rex T. Nissen, is a permanently totally disabled worker within the meaning of the Industrial Insurance Act. The employer takes the position, however, that Mr. Nissen's total disability is not the result solely of the 1974 industrial injury which he incurred during the course of his employment with Chicago Bridge and Iron Company (CBI). The employer argues that the evidence best supports that Mr. Nissen's disability is due to the effects of his 1974 industrial injury superimposed upon and combined with the residuals of injuries in 1940 and 1957.

We note that the claimant at all times before us proceeded on the theory that the 1940, 1957 and 1974 injuries combined to preclude his working on a reasonably continuous basis. In addition, Drs. Elbert Ford and Verne E. Cressey both opined that the two earlier neck injuries *contributed* to Mr. Nissen's total diability. Although Dr. Ford did state that "purely from his psychiatric state (which developed solely from the 1974 industrial injury) he was totally disabled", we do not believe such evidence preponderates against a "combined effects" conclusion.

In addition to the fact of combined effects producing total disability, CBI would have this Board find that it did hire Mr. Nissen with knowledge of his previous injuries and infirmities. This fact, too, is undisputed by the claimant. Being well aware of the purposes of second-injury fund relief, ordinarily these facts would be sufficient for this Board to enter findings of fact and conclusions of law granting the employer's request for second-injury fund relief. That relief would come about by virtue of the application of RCW 51.16.120, as amended by Laws of 1977, 1st Ex. Sess. Chap. 323, § 13. However, this Board has previously been faced squarely with the issue of whether that amendment can be applied retrospectively to benefit self-insured employers for injuries that occurred to their covered workers before the effective date of the 1977 amendment to that section.

In our judgment, RCW 51.16.120, as amended in 1977 can be applied prospectively only, and cannot provide a second-injury relief when the claimant was injured prior to the effective date of the 1977 amendment even though the claim was closed after the effective date.

This state has long recognized the need for employers to hire previously partially disabled workers. Still, accompanying that need was the risk that such workers might suffer a further injury and become permanently totally disabled due to the combined effects of the workers' conditions. Under the law, prior to the enactment of the predecessor to RCW 51.16.120, the employer of a previously disabled worker bore the entire cost experience of a worker subsequently becoming permanently totally disabled from a "second" injury regardless of the magnitude of that "further" injury. To still encourage the hiring of disabled workers and yet relieve employers of such a severe financial risk, the legislature added a new provision to the Industrial Insurance Act in 1943. This statute provided that a worker, disabled as a result of a previous injury or disease, who suffered a further injury or disease and became permanently totally disabled from the combined effects of those incidents, would affect the employer financially by charging only that portion of impairment resulting solely from the second injury to that employer's cost experience.

In 1971, the legislature created a special class of employers now known as self-insurers as defined in RCW 51.08.173, and as qualified in Chapter 51.14 RCW. While providing qualifying employers the opportunity to become self-insured, the legislature made no amendment whatsoever to the statutes governing the second injury fund. In 1977, the legislature amended RCW 51.16.120 so that it thereafter read (with significant changes underlined):

> "51.16.120. Distribution of further accident cost. (1) Whenever a worker has a previous bodily disability from any previous injury or disease and shall suffer a further disability from injury or occupational disease in employment covered by this title and become totally and permanently disabled from the combined effects thereof or die when death was substantially accelerated by the combined effects thereof, then the experience record of an

employer insured with the state fund at the time of said further injury or disease shall be charged and a self-insured employer shall pay directly into the reserve fund only the accident cost which would have resulted solely from said further injury or disease, had there been no pre-existing disability, and which accident cost shall be based upon an evaluation of the disability by medical experts. The difference between the charge thus assessed to such employer at the time of said further injury or disease and the total cost of the pension reserve shall be assessed against the second injury fund. The department shall pass upon the application of this section in all cases where benefits are paid for total permanent disability or death and issue an order thereon appealable by the employer. Pending outcome of such appeal the transfer or payment shall be made as required by such order.

(2) The department shall, in cases of claims of workers sustaining injuries or occupational diseases in the employ of state fund employers, recompute the experience record of such employers when the claims of workers injured in their employ have been found to qualify for payments from the second injury fund after the regular time for computation of such experience records and the department may make appropriate adjustments in such cases including cash refunds or credits to such employers.

(3) To encourage employment of injured workers who are not reemployed by the employer at the time of injury, the department may adopt rules providing for the reduction or elimination of premiums or assessments from subsequent employers of such workers and may also adopt rules for the reduction or elimination of charges against such employers in the event of further injury to such workers in their employ."

The first argument advanced by Chicago Bridge & Iron Co. to support its position is that the Department failed to issue an order to the employer regarding the applicability of second-injury fund relief as mandated by RCW 51.16.120. This argument is without merit. The Department effectively denied second-injury fund relief in its order dated August 24, 1982, by requiring CBI to deposit 100% of the pension reserve funds due. Moreover, the Department ap-

peared in this matter on March 2, 1983, and indicated that its purpose in appearing was "to defend a portion of the Department order which denied the self-insured employer second-injury fund relief." See also, Exhibit B.

The second argument advanced by CBI is that in 1971, when the legislature created self-insured employers, the definition of "employer" was not amended to make a distinction between self-insured employers and employers insured with the state fund. Therefore, CBI reasons that it still met the definition of "employer" and therefore remained covered by RCW 51.16.120, despite having been certified to self-insured status soon after the enactment of self-insurance in this state in 1971. This contention is likewise unpersuasive. It ignores the fact that in 1971, when self-insurance was permitted for qualifying employers, the legislature made no changes in the mechanism for funding the second-injury fund, which was solely supported by contributions of non-self-insurers.

In Laws of 1972, First Extraordinary Session, Chapter 43, Section 27, RCW 51.44.040, the funding statute for the second-injury fund, the legislature provided that:

> "Payments to the second-injury fund *from the accident fund* shall be made pursuant to rules and regulations promulgated by the director."

The legislature did not provide the director of the Department with authority to require self-insured employers to contribute to the second-injury fund until the legislature amended RCW 51.44.040 by Section 21, Chapter 323, Laws of 1977, First Extraordinary Session. Since self-insured employers were not contributing to the second-injury fund prior to July 1, 1977 (the effective date of amendment), the argument that self-insurers have always been covered by the provisions of RCW 51.16.120 is unpersuasive. The same observation disposes of CBI's contention that the Department's classification of employers as state-insured and self-insured with respect to second-injury fund relief is a "manifestly arbitrary, unreasonable, inequitable and unjust" classification. See *State ex rel. O'Brien v. Towne,* 64 Wn.2d 581 (1964).

The final argument propounded by CBI is that RCW 51.16.120 as amended in 1977 should be applied retro-

actively rather than prospectively. As a general rule, awards payable under the Workers' Compensation Act are governed by the law in effect at the time the injury occurred to the worker. *Lynch v. Department of Labor and Industries,* 19 Wn.2d 802 (1944); *Barlia v. Department of Labor and Industries,* 23 Wn.2d 126 (1945); *Bodine v. Department of Labor and Industries,* 29 Wn.2d 879 (1948).

In *Bodine,* the court declined to apply a statute which amended authority to fix attorney's fees for services before the Department and the Board to a case where the injury occurred prior to the amendment's effective date. The rights of the parties were held to be governed by the law in effect at the time the injury occurred, since to hold otherwise would have impaired existing contractual rights and obligations.

It is also a general rule that a statute should be given prospective effect only. *State v. Edwards,* 162 Wn. 268 (1931); *Ashenbrenner v. Department of Labor and Industries,* 62 Wn.2d 22 (1963). Retroactive statutes are generally regarded with disfavor, and the presumption in favor of prospective operation of a statute is difficult, although not impossible, to overcome. It is overcome by a specific legislative grant of retroactive application. However, RCW 51.16.120 as amended in 1977 does not expressly state that it shall operate retrospectively. A review of Washington cases reveals that, despite the presumption favoring prospectivity, courts have given retroactive application to statutes which relate to practice, procedure or remedies and neither affect a contractual or vested right, nor impose a penalty. *Nelson v. Department of Labor and Industries,* 9 Wn.2d 621 (1941); *Pape v. Department of Labor and Industries,* 43 Wn.2d 736 (1953). Clearly, the questioned amendment does not impose a penalty; rather it broadens the coverage of RCW 51.16.120 to include self-insured employers. It is equally evident that it affects no contractual obligations between self-insurers and the Department, since prior to 1977 these employers neither contributed to nor benefitted from the second-injury fund. On the other hand, if RCW 51.16.120 as amended in 1977 were to be applied retroactively, it would indeed affect certain vested and contractual rights between the Department and employers insured with the state fund, by in effect using monies supplied by state fund-insured employers (or the proceeds from

such funds) to reduce the financial liability of non-contributing self-insurers.

Finally, the 1977 amendment to RCW 51.16.120 provides for *substantive* changes in the rights of self-insured employers and does not relate merely to practice or procedure. While the Workers' Compensation Act usually is considered remedial and for the benefit of the worker, the specific provision of the Workers' Compensation Act at issue in this appeal is not remedial in nature as it in no way affects the level of benefits flowing to the permanently totally disabled worker.

For the foregoing reasons, it is concluded that RCW 51.16.120 as amended in 1977 should be applied prospectively only. It cannot be applied to provide second-injury relief to self-insured employers of individuals who incurred their final injury in such self-insured employment prior to July 1, 1977.

After consideration of the Proposed Decision and Order, and the Petition for Review filed thereto, and a careful review of the entire record before us we hereby enter the following:

## FINDINGS OF FACT

1. On March 1, 1974, the Department of Labor and Industries received an application for benefits alleging the occurrence of an industrial injury to Rex T. Nissen on February 25, 1974, at Coulee Dam, Washington, during the course of his employment with Chicago Bridge & Iron Company, a self-insured employer under the Industrial Insurance Act. The claim was allowed and assigned Claim No. S-133373, treatment and time-loss compensation were provided, and on June 13, 1975, the Department issued an order closing the claim with payment of time-loss compensation to June 8, 1975, and a permanent partial disability award for cervical and cervical-dorsal impairment equal to 20% as compared to total bodily impairment. A protest and request for reconsideration of the Department's June 13, 1975 closing order was filed on July 1, 1975, and on August 12, 1975, the Department issued an order holding the June 13, 1975 order in abeyance pending further investigation.

Further treatment and time-loss compensation were provided, and on January 2, 1976, the Department again closed the claim with no additional award for permanent partial disability. The January 2, 1976 closing order was appealed to this Board, and in due course the Board issued an Order on Agreement of Parties remanding the claim for further investigation and action. The Board Order on Agreement of Parties was effectuated by Department order dated December 21, 1976, and on March 17, 1977, the Department issued an order closing the claim with an aggregate permanent partial disability award for cervical and cervical-dorsal impairment equal to 30% as compared to total bodily impairment.

Commencing May 21, 1979, a series of applications to reopen the claim on grounds of aggravation of condition was filed on behalf of Mr. Nissen. Interlocutory action ensued, the claim was reopened, and on August 24, 1982, the Department issued an order finding that due solely to conditions causally related to Mr. Nissen's industrial injury of February 25, 1974, he was entitled to the status of a permanently totally disabled worker effective January 8, 1979. A notice of appeal was filed on October 18, 1982, on behalf of the self-insured employer, and on November 9, 1982, this Board issued its order granting the appeal, assigned it Docket No. 63,214, and directed that proceedings be held on the issues therein raised.

On August 24, 1982, the Department issued a separate order requiring Chicago Bridge & Iron Company to submit to the Department 100% of the reserve amount required to pay the pension pursuant to RCW 51.44.070(1), or to pay accrued benefits from January 8, 1979 to August 15, 1982 in an amount of $22,736.66, plus cash deposit equal to monthly pension benefits totaling $1,576.50, for a total deposit of $24,313.16. The order further directed the employer to file the required bond in an amount to be determined by the insurance commissioner pursuant to RCW 51.44.070(2). A notice of appeal from this Department order dated August 24, 1982 was filed on behalf of the self-insured employer on October 18, 1982. By order dated November 9, 1982, this

Board granted the appeal, assigned it Docket No. 63,215, and directed that proceedings be held on the issues therein raised.

2. As of January 8, 1979, Rex T. Nissen suffered from conditions diagnosed as: status post compression fractures of the 4th, 5th, 6th, 7th, 8th and 9th cervical vertebrae; severe chronic psychogenic pain disorder; and severe reactive depression.

3. The conditions diagnosed in Finding No. 2 resulted from three major injuries to Mr. Nissen. Specifically, claimant Nissen crushed his 4th, 5th, 6th and 7th cervical vertebrae in a rodeo accident on May 11, 1940; he crushed his 8th and 9th cervical vertebrae on October 7, 1957, as he threw a fifty pound tool box onto his shoulder in an industrial injury in Montana; and he developed severe chronic psychogenic pain disorder and severe reactive depression with suicidal ruminations following an injury during the course of his employment at Coulee Dam, Washington, for Chicago Bridge & Iron on February 25, 1974, in which injury a co-worker was killed.

4. As of January 8, 1979, the conditions diagnosed in Finding No. 2 were fixed and medically stationary, and no further curative treatment was available.

5. Rex T. Nissen is a sixty-one year old male who did not quite finish high school. Throughout his adult life, he has engaged in heavy physical labor in the construction industry. His three injuries have left him with residual neck and back pain, headaches, a severely limited ability to lift and carry objects, marked apprehension so as to interfere with memory and concentration and to markedly disturb personal relationships, suicidal preoccupation, persistent loss of function from conversion or hysterical reactions and depression causing marked loss of interest in daily activities.

6. The loss of function and permanent mental impairment resulting from the claimant's industrial injury of February 25, 1974, combined with and superimposed upon the physical impairments from his rodeo injury on May 11, 1940, and the toolbox injury on October 7, 1957, coupled with his age, education, training and experience,

have rendered him, effective January 8, 1979, unable to maintain gainful employment which is within his qualifications and regularly available in the competitive labor market.

7. Chicago Bridge & Iron Co. hired Mr. Nissen with full knowledge of his 1940 and 1957 injuries and the residual effects thereof.

## CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, this Board concludes as follows:

1. The Board of Industrial Insurance Appeals has jurisdiction of the parties and subject matter of the appeal assigned Docket No. 63,214.
2. The Board of Industrial Insurance Appeals has jurisdiction of the parties and subject matter of the appeal assigned Docket No. 63,215.
3. As of January 8, 1979, due to the combined effects of his 1940 injury, his 1957 injury, and his 1974 Washington industrial injury, Rex T. Nissen was a permanently totally disabled worker within the purview of the Workers' Compensation Act of this state.
4. Second-injury fund relief is not available to self-insured employers unless the injury or injuries giving rise to a permanently totally disabled status under the Industrial Insurance Act occurred on or after July 1, 1977. RCW 51.16.120, as amended by Chapter 323, *Laws of 1977, First Extraordinary Session,* applies prospectively only.
5. The order of the Department of Labor and Industries dated August 24, 1982, placing Rex T. Nissen on the pension rolls effective January 8, 1979, is incorrect only in that it fails to acknowledge that Mr. Nissen's permanent total disability resulted from the combined effects of his 1940, 1957 and 1974 injuries.
6. The Department order of August 24, 1982, requiring Chicago Bridge & Iron Co. to deposit into the pension reserve fund 100% of the dollar amounts necessary to provide Mr. Nissen with the pension to which he is entitled, and in effect, denying second-injury fund

relief to Chicago Bridge & Iron, is correct and should be affirmed.

## ORDER

The order of the Department of Labor and Industries dated August 24, 1982 (Docket No. 63,214), which classified Rex T. Nissen permanently totally disabled as of January 8, 1979, is hereby reversed insofar as it declares the claimant's injury of February 25, 1974 is the sole injury responsible for Mr. Nissen's disability, and the claim is remanded to the Department with instructions to enter an order acknowledging that the combined effects of Mr. Nissen's 1940, 1957 and 1974 injuries rendered him permanently totally disabled as of January 8, 1979.

The order of the Department of Labor and Industries dated August 24, 1982 (Docket No. 63,215), which implicitly denied Chicago Bridge & Iron's request for second-injury fund relief and ordered CBI to deposit into the pension reserve fund 100% of the dollar amounts necessary to provide appropriate monthly payments for Mr. Nissen's permanent total disability, is affirmed.

Dated this 2nd day of November, 1983.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/ MICHAEL L. HALL

Michael L. Hall — Chairman

/s/ FRANK E. FENNERTY, JR.

Frank E. Fennerty, Jr. — Member

/s/ PHILLIP T. BORK

Phillip T. Bork — Member

## APPENDIX H

### SUBSIDIARIES AND AFFILIATES OF CBI INDUSTRIES, INC.

CBI Na-Con, Inc.

CBI Services, Inc.

Sea-Con Services, Inc.

Liquid Carbonic Industries Corporation

Walker Process Corporation

Integrated Drilling and Exploration, Inc.

Fibre Making Processes, Inc.

# APPENDIX I

## SELECTED 1972 INDUSTRIAL INSURANCE STATUTES

The following statutes are reproduced in bill form so that the changes made by the Legislature may be more easily identified.

*Page*

RCW 51.16.020
Laws of 1972, 1st Ex. Sess., Ch. 43 §13 p. 84 . 29a

RCW 51.44.040
Laws of 1972, 1st Ex. Sess., Ch. 43 §27 p. 97 . 29a

RCW 51.16.120 — Whenever a workman has sustained a previous bodily infirmity or disability from any previous injury or disease and shall suffer a further injury or disease in employment covered by this title and become totally and permanently disabled from the combined effects thereof, then the (~~accident cost rate~~) *experience record* of the employer at the time of said further injury or disease shall be charged only with the accident cost which would have resulted solely from said further injury or disease, had there been no preexisting disability, and which accident cost shall be based upon an evaluation of the disability by medical experts. The difference between the charge thus assessed to the employer at the time of said further injury or disease and the total cost of the pension reserve shall be assessed against the second injury (~~account~~) *fund.*

RCW 51.44.040 — *(1) There shall be* (~~a special account within the accident~~) *in the office of the state treasurer, a* fund to be known and designated as the "second injury (~~account~~) *fund,*" which shall be used only for the purpose of defraying charges against it as provided in RCW 51.15.120. *Said fund shall be administered by the director. The state treasurer shall be the custodian of the second injury fund and shall be authorized to disburse moneys from it only upon written order of the director.*

(~~The charge to each class of the accident fund to defray charges against the second injury account shall be made on June 30th and December 31st of each year; and the total industrial insurance premium contributions of each class~~

~~for the preceding calendar year shall be used in determining the proportionate charge to each class for the second injury account.~~) *(2) Payments to the second injury fund from the accident fund shall be made pursuant to rules and regulations promulgated by the director.*

# APPENDIX J

## SELECTED 1974 INDUSTRIAL INSURANCE STATUTES


| *Statute* | *Page* |
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| RCW 51.08.010 | 31a |
| RCW 51.08.070 | 31a |
| RCW 51.08.150 | 31a |
| RCW 51.08.160 | 32a |
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| RCW 51.44.040 | 41a |
| RCW 51.44.070 | 41a |
| RCW 51.44.110 | 41a |


**51.08.010 Meaning of words.** Unless the context indicates otherwise, words used in this title shall have the meaning given in this chapter.

**51.08.070 "Employer".** "Employer" means any person, body of persons, corporate or otherwise, and the legal representatives of a deceased employer, all while engaged in this state in any work covered by the provisions of this title, by way of trade or business, or who contracts with one or more workmen, the essence of which is the personal labor of such workman or workmen.

**51.08.150 "Permanent partial disability".** "Permanent partial disability" means the loss of either one foot, one leg, one hand, one arm, one eye, one or more fingers, one

or more toes, any dislocation where ligaments were severed where repair is not complete, or any other injury known in surgery to be permanent partial disability.

**51.08.160 "Permanent total disability".** "Permanent total disability" means loss of both legs, or arms, or one leg and one arm, total loss of eyesight, paralysis or other condition permanently incapacitating the workman from performing any work at any gainful occupation.

**51.08.173 "Self-insurer".** "Self-insurer" means an employer who has been authorized under this title to carry its own liability to its employees covered by this title.

**51.08.175 "State fund".** Whenever the term "state fund" is used in the provisions of this 1971 amendatory act, it shall mean those funds held by the state or any agency thereof for the purposes of this title. The director shall manage the state fund and shall have such powers as are necessary to carry out its functions and may reinsure any risk insured by the state fund.

**51.08.185 "Employee".** "Employee" shall have the same meaning as "workman" when the context would so indicate, and shall include all officers of the state, state agencies, counties, municipal corporations, or other public corporations, or political subdivisions.

**51.14.010 Duty to secure payment of compensation — Options.** Every employer under this title shall secure the payment of compensation under this title by:

(1) Insuring and keeping insured the payment of such benefits with the state fund; or

(2) Qualifying as a self-insurer under this title.

**51.14.020 Qualification as self-insurer — Security deposit — Reinsurance.** (1) An employer may qualify as a self-insurer by establishing to the director's satisfaction that he has sufficient financial ability to make certain the prompt payment of all compensation under this title and all assessments which may become due from such employer.

(2) A self-insurer may establish sufficient financial ability by depositing in an escrow account in a depository designated by the director, money and/or corporate or govern-

mental securities approved by the director, or a surety bond written by any company admitted to transact surety business in this state filed with the department. The money, securities, or bond shall be in an amount reasonably sufficient in the director's discretion to insure payment of reasonably foreseeable compensation and assessments but not less than the employer's normal expected annual claim liabilities and in no event less than one hundred thousand dollars. In arriving at the amount of money, securities, or bond required under this subsection, the director shall take into consideration the financial ability of the employer to pay compensation and assessments and his probable continuity of operation. The money, securities, or bond so deposited shall be held by the director to secure the payment of compensation by the self-insurer and to secure payment of his assessments. The amount of security may be increased or decreased from time to time by the director. The income from any securities deposited may be distributed currently to the self-insurer.

(3) Securities or money deposited by an employer pursuant to subsection (2) of this section shall be returned to him upon his written request provided the employer files the bond required by such subsection.

(4) If the employer seeking to qualify as a self-insurer has previously insured with the state fund, the director shall require the employer to make up his proper share of any deficit or insufficiency in the state fund as a condition to certification as a self-insurer.

(5) A self-insurer may reinsure a portion of his liability under this title with any reinsurer authorized to transact such reinsurance in this State: *Provided,* That the reinsurer may not participate in the administration of the responsibilities of the self-insurer under this title. Such reinsurance may not exceed eighty percent of the liabilities under this title.

**51.14.030 Certification of employer as self-insurer — Requirements.** The director may issue a certification that an employer is qualified as a self-insurer when such employer meets the following requirements:

(1) He has fulfilled the requirements of RCW 51.14.020.

(2) He has submitted to the department a payroll report

for the preceding consecutive twelve month period.

(3) He has submitted to the department a sworn itemized statement indicating that the employer has sufficient liquid assets to meet his estimated liabilities as a self-insurer.

(4) He has submitted to the department a description of the safety organization maintained by him within his establishment that indicates a record of accident prevention.

(5) He has submitted to the department a description of the administrative organization to be maintained by him to manage industrial insurance matters including:

(a) The reporting of injuries;
(b) The authorization of medical care;
(c) The payment of compensation;
(d) The handling of claims for compensation;
(e) The name and location of each business location of the employer; and
(f) The qualifications of the personnel of the employer to perform this service.

Such certification shall remain in effect until withdrawn by the director or surrendered by the employer with the approval of the director. An employer's qualification as a self-insurer shall become effective on the date of certification or any date specified in the certificate after the date of certification.

**51.14.040 Surety liability — Termination.** (1) The surety on a bond filed by a self-insurer pursuant to this title may terminate its liability thereon by giving the director written notice stating when, not less than thirty days thereafter, such termination shall be effective.

(2) In case of such termination, the surety shall remain liable, in accordance with the terms of the bond, with respect to future compensation for injuries to employees of the self-insurer occurring prior to the termination of the surety's liability.

(3) If the bond is terminated for any reason other than the employer's terminating his status as a self-insurer, the employer shall, prior to the date of termination of the surety's liability, otherwise comply with the requirements of this title.

(4) The liability of a surety on any bond filed pursuant to this section shall be released and extinguished and the bond

returned to the employer or surety provided either such liability is secured by another bond filed, or money or securities deposited as required by this title.

**51.14.050 Termination of self-insurer status — Notice — Financial requirements.** (1) Any employer may at any time terminate his status as a self-insurer by giving the director written notice stating when, not less than thirty days thereafter, such termination shall be effective, provided such termination shall not be effective until the employer either shall have ceased to be an employer or shall have filed with the director for state industrial insurance coverage under this title.

(2) An employer who ceases to be a self-insurer, and who so files with the director, must maintain money, securities or surety bonds deemed sufficient in the director's discretion to cover the entire liability of such employer for injuries or occupational diseases to his employees which occurred during the period of self-insurance: *Provided,* That the director may agree for the medical aid and accident funds to assume the obligation of such claims, in whole or in part, and shall adjust the employer's premium rate to provide for the payment of such obligations on behalf of the employer.

**51.14.060 Default by self-insurer — Director authorized to sue, sell securities, fulfill employer obligations — Subrogation rights.** (1) The director may, in cases of default upon any obligation under this title by the self-insurer, after ten days notice by certified mail to the defaulting self-insurer of his intention to do so, bring suit upon such bond or collect the interest and principal of any of the securities as they may become due or sell the securities or any of them as may be required or apply the money deposited, all in order to pay compensation, discharge the obligations of the self-insurer under this title, and pay premiums for future insurance of the employer's obligations.

(2) The director shall be authorized to fulfill the defaulting self-insured employer's obligations under this title, paying the necessary premium from the defaulting employer's deposit or from other funds provided under this title for the satisfaction of claims against the defaulting em-

ployer, and having subrogation rights against the defaulting employer to the extent of any funds, other than the employer's deposit, expended for the payment of premiums or compensation in performance of the defaulting employer's obligations.

**51.14.070 Payment of compensation upon default—Sugrogation right.** (1) Whenever compensation due under this title is not paid because of an uncorrected default of a self-insurer, such compensation shall be paid from the medical aid and accidents funds only after the moneys available from the bonds or other security provided under RCW 51.14.020 have been exhausted.

(2) Such defaulting self-insurer or surety, if any, shall be liable for payment into the appropriate fund of the amounts paid therefrom by the director, and for the purpose of enforcing this liability the director, for the benefit of the appropriate fund, shall be subrogated to all of the rights of the person receiving such compensation.

**51.14.080 Withdrawal of certification — Grounds.** Certification of a self-insurer shall be withdrawn by the director upon one or more of the following grounds:

(1) The employer no longer meets the requirements of a self-insurer; or

(2) The self-insurer's deposit is insufficient; or

(3) The self-insurer intentionally or repeatedly induces employees to fail to report injuries, induces claimants to treat injuries in the course of employment as off-the-job injuries, persuades claimants to accept less than the compensation due, or unreasonably makes it necessary for claimants to resort to proceedings against the employer to obtain compensation; or

(4) The self-insurer habitually fails to comply with rules and regulations of the director regarding reports or other requirements necessary to carry out the purposes of this title; or

(5) The self-insurer habitually engages in a practice of arbitrarily or unreasonably refusing employment to applicants for employment or discharging employees because of nondisabling bodily conditions.

**51.14.090 Petition by employees for hearing to withdraw certification — Grounds — Notice — Opportunity to cure — Appeal.** (1) Upon the petition of any employee, union or association having a substantial number of employees in the employ of said self-insurer, the director shall hold a hearing to determine whether or not there are grounds for the withdrawal of certification of a self-insurer. He shall serve upon the self-insurer and upon any employee union or association having a substantial number of employees in the employ of said self-insurer, personally or by certified mail, a notice of intention to withdraw, or not to withdraw, certification of the self-insurer, which notice shall describe the nature and location or locations of the plants or operations involved; and the specific nature of the reasons for his decision. If the decision is to withdraw certification, it shall include the period of time within which the ground or grounds therefor existed or arose; a directive to the self-insurer specifying the manner in which the grounds may be eliminated; and the date, not less than thirty days after the self-insurer's receipt of the notice, when the certification will be withdrawn in the absence of a satisfactory elimination of the grounds for withdrawal of the certificate.

(2) An appeal of such notice of intention to withdraw, or not to withdraw, certification of a self-insurer may be taken by the self-insurer, or by any employee, or union, or association having a substantial number of employees in the employ of said self-insurer. Proceedings on such appeal shall be as prescribed in this title. Appeal by a self-insurer of notice of intention to withdraw certification shall not act as a stay of the withdrawal, unless the board, or court, for good cause shown, orders otherwise.

**51.14.100 Notice of compliance with title to be posted — Penalty.** (1) Every employer subject to the provisions of this title shall post and keep posted in a conspicuous place or places in and about his place or places of business a reasonable number of typewritten or printed notices of compliance substantially identical to a form prescribed by the director, stating that such employer is subject to the provisions of this title. Such notice shall advise whether the employer is self-insured or has insured with the

department, and shall designate a person or persons on the premises to whom report of injury shall be made.

(2) Any employer who has failed to open an account with the department or qualify as a self-insurer shall not post or permit to be posted on or about his place of business or premises any notice of compliance with this title and any willful violation of this subsection by any officer or supervisory employee of an employer shall be a misdemeanor.

**51.14.110 Employer's duty to maintain records, furnish information.** Every self-insurer shall maintain a record of all payments of compensation made under this title. The self-insurer shall furnish to the director all information he has in his possession as to any disputed claim, upon forms approved by the director.

**51.16.035 Classification of occupations or industries — Premium rates fixed, readjusted — Rules and regulations authorized.** The department shall classify all occupations or industries in accordance with their degree of hazard and fix therefor basic rates of premium which shall be the lowest necessary to maintain actuarial solvency of the accident and medical aid funds in accordance with recognized insurance principles. The department shall formulate and adopt rules and regulations governing the method of premium calculation and collection and providing for a rating system consistent with recognized principles of workmen's compensation insurance which shall be designed to stimulate and encourage accident prevention and to facilitate collection. The department may annually, or at such other times as it deems necessary to maintain solvency of the funds, readjust rates in accordance with the rating system to become effective on such dates as the department may designate.

**51.16.120 Distribution of further accident cost.** Whenever a workman has sustained a previous bodily infirmity or disability from any previous injury or disease and shall suffer a further injury or disease in employment covered by this title and become totally and permanently disabled from the combined effects thereof, then the experience record of the employer at the time of said further injury or disease shall be charged only with the accident cost which

would have resulted solely from said further injury or disease, had there been no preexisting disability, and which accident cost shall be based upon an evaluation of the disability by medical experts. The difference between the charge thus assessed to the employer at the time of said further injury or disease and the total cost of the pension reserve shall be assessed against the second injury fund.

**51.28.040 Application for change in compensation — Effective date.** If change of circumstances warrants an increase or rearrangement of compensation, like application shall be made therefor. No increase or rearrangement shall be operative for any period prior to application therefor.

**51.32.060 Permanent total disability compensation — Personal attendant.** When the supervisor of industrial insurance shall determine that permanent total disability results from the injury, the workman shall receive monthly during the period of such disability:

(1) If married at the time of injury, sixty-five percent of his wages but not less than two hundred fifteen dollars per month.

(2) If married with one child at the time of injury, sixty-seven percent of his wages but not less than two hundred fifty-two dollars per month.

(3) If married with two children at the time of injury, sixty-nine percent of his wages but not less than two hundred eighty-three dollars.

(4) If married with three children at the time of injury, seventy-one percent of his wages but not less than three hundred six dollars per month.

(5) If married with four children at the time of injury, seventy-three percent of his wages but not less than three hundred twenty-nine dollars per month.

(6) If married with five or more children at the time of injury, seventy-five percent of his wages but not less than three hundred fifty-two dollars per month.

(7) If unmarried at the time of the injury, sixty percent of his wages but not less than one hundred eighty-five dollars per month.

(8) If unmarried with one child at the time of injury,

sixty-two percent of his wages but not less than two hundred twenty-two dollars per month.

(9) If unmarried with two children at the time of injury, sixty-four percent of his wages but not less than two hundred fifty-three dollars per month.

(10) If unmarried with three children at the time of injury, sixty-six percent of his wages but not less than two hundred seventy-six dollars per month.

(11) If unmarried with four children at the time of injury, sixty-eight percent of his wages but not less than two hundred ninety-nine dollars per month.

(12) If unmarried with five or more children at the time of injury, seventy percent of his wages but not less than three hundred twenty-two dollars per month.

(13) For any period of time where both husband and wife are entitled to compensation as temporarily or totally disabled workmen, only that spouse having the higher wages of the two shall be entitled to claim their child or children for compensation purposes.

(14) In case of permanent total disability, if the character of the injury is such as to render the workman so physically helpless as to require the hiring of the services of an attendant, the monthly payment by the department to such attendant for such services shall be an amount not to exceed forty percent of the average monthly wage in the state as computed in RCW 51.08.018 per month as long as such requirement continues, but such payments shall not obtain or be operative while the workman is receiving care under or pursuant to the provisions of chapters 51.36 and 51.40 RCW.

(15) Should any further accident result in the permanent total disability of an injured workman, he shall receive the pension to which he would be entitled, notwithstanding the payment of a lump sum for his prior injury.

(16) In no event shall the monthly payments provided in this section exceed seventy-five percent of the average monthly wage in the state as computed under the provisions of RCW 51.08.018, except that this limitation shall not apply to the payments provided for in subsection (14) of this section.

**51.44.010 Accident fund.** There shall be, in the office

of the state treasurer, a fund to be known and designated as the "accident fund."

**51.44.030 Reserve fund.** There shall be, in the office of the state treasurer, a fund to be known and designated as the "reserve fund."

**51.44.040 Second injury fund.** (1) There shall be in the office of the state treasurer, a fund to be known and designated as the "second injury fund", which shall be used only for the purpose of defraying charges against it as provided in RCW 51.16.120. Said fund shall be administered by the director. The state treasurer shall be the custodian of the second injury fund and shall be authorized to disburse moneys from it only upon written order of the director.

(2) Payments to the second injury fund from the accident fund shall be made pursuant to rules and regulations promulgated by the director.

**51.44.070 Transfer from accident fund, accounts to reserve fund — Annuity values — Self-insurer payments to fund.** For every case resulting in death or permanent total disability the department shall transfer on its books from the accident fund of the proper class and/or appropriate account to the "reserve fund" a sum of money for that case equal to the estimated present cash value of the monthly payments provided for it, to be calculated upon the basis of an annuity covering the payments in this title provided to be made for the case. Such annuity values shall be based upon rates of mortality, disability, remarriage, and interest as determined by the state insurance commissioner, taking into account the experience of the reserve fund in such respects.

Similarly, a self-insurer in these circumstances shall pay into the reserve fund a sum of money computed in the same manner, and the disbursements therefrom shall be made as in other cases.

**51.44.110 Disbursements of funds.** Disbursement out of the several funds shall be made only upon warrants drawn by the department. The state treasurer shall pay every warrant out of the fund upon which it is drawn. If, at any time, there shall not be sufficient money in the fund on

which any such warrant is drawn wherewith to pay the same, the employer on account of whose workman it was that the warrant was drawn shall pay the same, and he shall be credited upon his next following contribution to such fund the amount so paid with interest thereon at the legal rate from the date of such payment to the date such next following contribution became payable and, if the amount of the credit shall exceed the amount of the contribution, he shall have a warrant upon the same fund for the excess and, if any such warrant shall not be so paid, it shall remain, nevertheless, payable out of the fund.

## APPENDIX K

## SELECTED 1977 INDUSTRIAL INSURANCE STATUTES

The following statutes are reproduced in bill form so that the changes made by the Legislature may be more easily identified.

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RCW 51.16.120
Laws of 1977, 1st Ex. Sess.,
Ch. 323 §13 p. 1239 ..... 43a

RCW 51.44.040
Laws of 1977, 1st Ex. Sess.,
Ch. 323 §21 p. 1242 ..... 44a

RCW 51.16.120 — Whenever a (~~workman~~) *worker* has (~~sustained~~) a previous bodily (~~infirmity or~~) disability from any previous injury or disease and shall suffer a further *disability from* injury or *occupational* disease in employment covered by this title and become totally and permanently disabled from the combined effects thereof *or die when death was substantially accelerated by the combined effects thereof,* then the experience record of (~~the~~) *an* employer *insured with the state fund* at the time of said further injury or disease, shall be charged *and a self-insured employer shall pay directly into the reserve fund* only (~~with~~) the accident cost which would have resulted solely from said further injury or disease had there been no preexisting disability, and which accident cost shall be based upon an evaluation of the disability by medical experts. The difference between the charge thus assessed to (~~the~~) *such* employer at the time of said further injury or disease and the total cost of the pension reserve shall be assessed against the second injury fund. *The department shall pass upon the application of this section in all cases where benefits are paid for total permanent disability or death and issue an order thereon appealable by the employer. Pending outcome of such appeal the transfer or payment shall be made as required by such order.*

*(2) The department shall, in cases of claims of workers sustaining injuries or occupational diseases in the employ of*

state fund employers, recompute the experience record of such employers when the claims of workers injured in their employ have been found to qualify for payments from the second injury fund after the regular time for computation of such experience records and the department may make appropriate adjustments in such cases including cash refunds or credits to such employers.

(3) To encourage employment of injured workers who are not reemployed by the employer at the time of injury, the department may adopt rules providing for the reduction or elimination of premiums or assessments from subsequent employers of such workers and may also adopt rules for the reduction or elimination of charges against such employers in the event of further injury to such workers in their employ.

RCW 51.44.040 — (1) There shall be in the office of the state treasurer, a fund to be known and designated as the "second injury fund", which shall be used only for the purpose of defraying charges against it as provided in RCW 51.16.120 *as now or hereafter amended.* Said fund shall be administered by the director. The state treasurer shall be the custodian of the second injury fund and shall be authorized to disburse moneys from it only upon written order of the director.

(2) Payments to the second injury fund from the accident fund shall be made pursuant to rules and regulations promulgated by the director.

*(3) Assessments for the second injury fund shall be imposed on self-insurers pursuant to rules and regulations promulgated by the director to ensure that self-insurers shall pay to such fund in the proportion that the payments made from such fund on account of claims made against self-insurers bears to the total sum of payments from such fund.*

# APPENDIX L

## SCHEMATIC DIAGRAM OF WASHINGTON INDUSTRIAL INSURANCE LAWS


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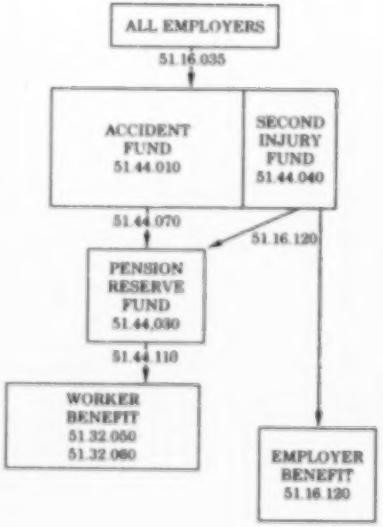
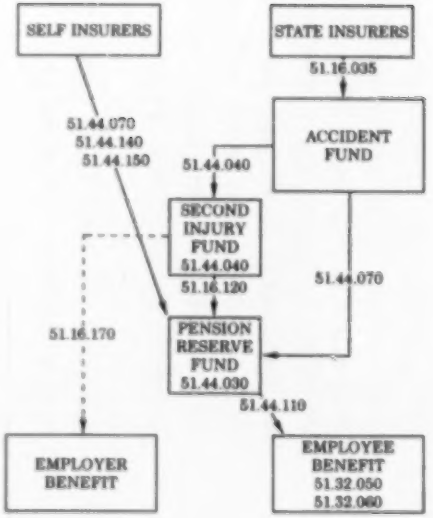
# VISUAL CHART OF WASHINGTON STATE WORKER COMPENSATION SCHEME FOR PERMANENT DISABILITIES

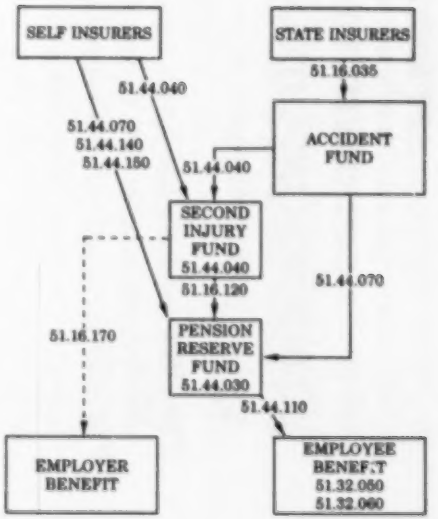
## PRE - 1971




## 1974

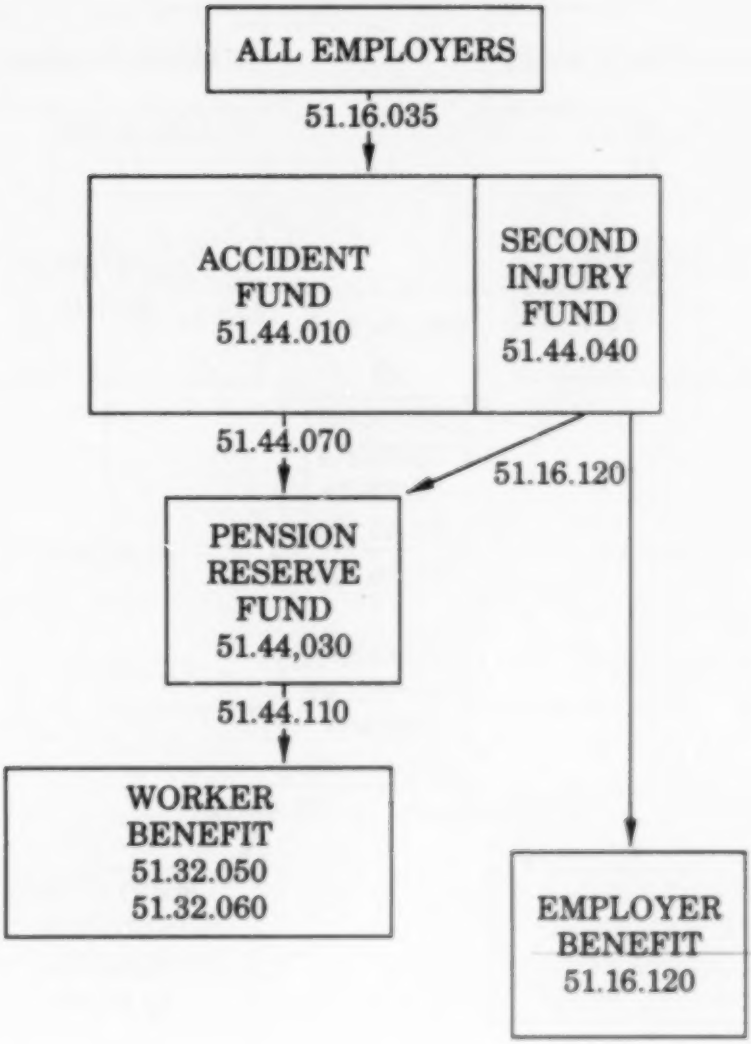



## POST - 1977



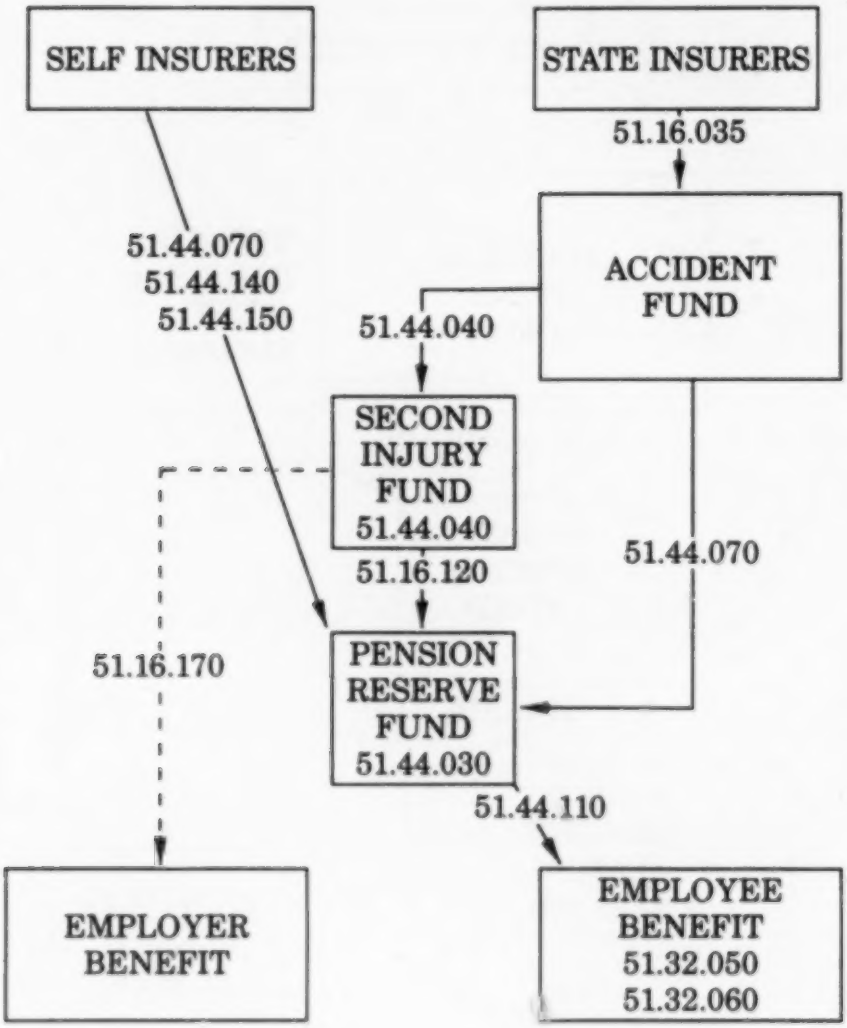
# WASHINGTON STATE WORKER COMPENSATION SCHEME

## PRE - 1971



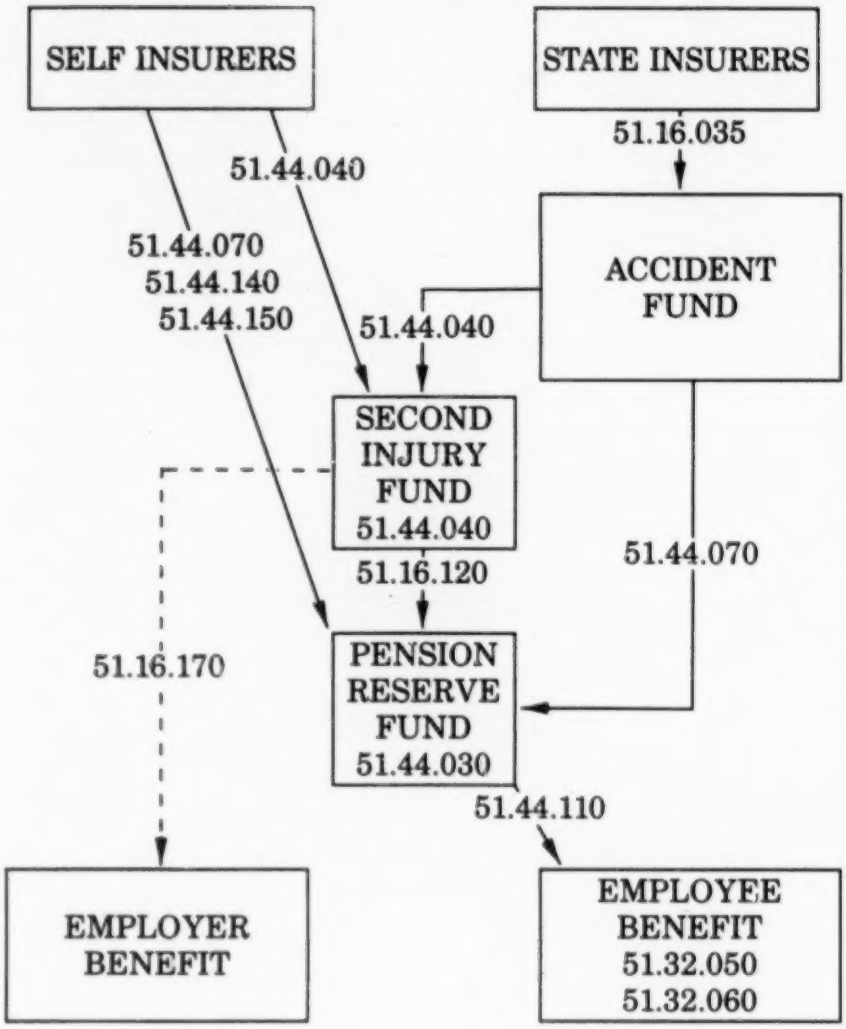
# WASHINGTON STATE WORKER COMPENSATION SCHEME

## 1974



# WASHINGTON STATE WORKER COMPENSATION SCHEME

## POST - 1977



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CLERK

No. 86-1926

IN THE

# SUPREME COURT

OF THE
UNITED STATES

## OCTOBER TERM, 1986

CHICAGO BRIDGE AND IRON COMPANY,
a corporation,

*Petitioner,*

v.

DEPARTMENT OF LABOR AND INDUSTRIES
OF THE STATE OF WASHINGTON, and
REX T. NISSEN,

*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF APPEALS, DIVISION III, OF
THE STATE OF WASHINGTON

## BRIEF OF DEPARTMENT OF LABOR AND INDUSTRIES IN OPPOSITION

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No. 86-1926

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*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF APPEALS, DIVISION III, OF
THE STATE OF WASHINGTON

## BRIEF OF DEPARTMENT OF LABOR AND INDUSTRIES IN OPPOSITION

The respondent Department of Labor and Industries respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the opinion of the Court of Appeals, Division III, of the State of Washington.

## REASONS WHY THE PETITION SHOULD BE DENIED

### THE PETITIONER'S FEDERAL CLAIM IS COMPLETELY WITHOUT MERIT

This petition is an imaginative effort to turn a garden-variety question of state law, involving solely the interpretation of a state statute, into a question of federal constitutional law. Stripped to its essentials, the petitioner's claim is that when a state court is faced with an arguably ambiguous state statute, susceptible of two alternative interpretations, the Due Process Clause of the Fourteenth Amendment requires a court to choose the interpretation more favorable to the petitioner's pocket book. The basis asserted for such a claim is that the petitioner would otherwise be deprived of a property interest without constitutionally adequate notice.

In examining the petitioner's federal constitutional claim, and the legal alchemy it would entail, we first review briefly the petitioner's state law claim, and the reasons why the state court rejected it.

*The Interpretive Problem Giving Rise To The Petitioner's State Law Claim.*

Before 1971, the petitioner, along with other employers in Washington State, was required to be insured under the state-operated workers' compensation system for industrial injuries. Private insurance and self-insurance were not permitted as a substitute for the state operated system. As with other insurance systems, the state system for workers' compensation established various classes of insureds, with the premium rates differing for each class. Employers in the heavy construction business, for example, would pay higher premiums than an employer in the restaurant business, because of the higher risk of injury to workers in the construction business. And the premium rates for employers in the construction business, of course, were based upon the loss experience of employers within that class. Further, the premium rate for a particular class was only a base rate, which could be increased or decreased for a particular employer within that class in accordance with that employer's specific loss experience.

This policy of varying the premium rates in accordance with the employer's loss experience, combined with a policy of encouraging the re-employment of previously injured workers, has been embodied in the state system from well before 1971 to the present. Integration of these two policies is accomplished through what is designated as the second injury fund. *See* Wash. Rev. Code § § 51.16.120 and 51.44.040.[1] A subsequent employer might be reluctant to hire a previously injured worker if that employer were required to pay, in the event of a second injury, premiums based upon the combined effect of both the first and second injuries. The second injury fund addresses that potential problem by operating as an accounting device for separating out the effects of the first and second injuries. This separation has the effect of charging the subsequent employer only with the second injury which is then used as the basis for determining the premium rate for the subsequent employer. This reduces the subsequent employer's rate from what it would have been if the combined effect of the two injuries were charged to the subsequent employer.

The second injury fund operates also as the source for the actual payments to the injured worker, to the extent that the payments are attributable to the effect of the first injury. (*See* Appendices A, B, and C.) Stated otherwise, the second injury fund is used to make up the difference between what the subsequent employer is charged against his experience record and the total cost of the award to the injured workman.

The second injury fund itself, of course, needs a source of financial support; and that source is the "acci-

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[1]In Appendices A through E, we reproduce various versions of Wash. Rev. Code § § 51.16.120 and 51.44.040, to show the evolution of the second injury fund from 1943 to the present. It has been long established that under Washington's industrial insurance law, the rights and obligations of the parties which control throughout the administration of a claim are those existing on the date of the worker's injury. *Ashenbrenner v. Department of Labor & Indus.*, 62 Wn.2d 22, 380 P.2d 730 (1963); *Bodine v. Department of Labor & Indus.*, 29 Wn.2d 879, 190 P.2d 89 (1948); *Barlia v. Department of Labor & Indus.*, 23 Wn.2d 126, 160 P.2d 503 (1945); *Lynch v. Department of Labor & Indus.*, 19 Wn.2d 802, 145 P.2d 265 (1944). Since respondent Nissen's injury occurred in 1974, the statutes then in effect are controlling. *See* App. B and D.

dent" fund, into which all employers under the state system pay their premiums. The second injury fund is financed on an "as needed" basis from that accident fund, which is used to pay all other workers' compensation claims as well. Thus the second injury fund is in effect financed by other employers insured under the state system.

The purpose and operation of the second injury fund thus fits smoothly with the operation of the state system as a whole. In 1971, however, employers were allowed to become self-insurers and thereby opt out of the state system. This change gave rise to the interpretive problem involved in this litigation. Did the benefit of the second injury fund now extend to self-insurers? The petitioner claimed that it did.

In authorizing the new system of self-insurance in 1971, the legislature gave no directions as to how the second injury fund was to fit—or whether it was to fit at all—with the self-insurance system. The new optional system was just dropped alongside the existing state system, without any apparent recognition by the legislature of any interaction between the two.

This problem was cleared up by the legislature in 1977, when it expressly authorized self-insured employers to obtain relief from the second injury fund *and* provided for assessments against those employers so that they would share as well in the financial support of the fund. *See* App. C and E. *See* also Wash. Admin. Code § 296-15-220, which establishes the equivalent of a separate second injury fund solely for self-insurers.

Until 1977, however, the relationship, if any, between the second injury fund and the new system of self-insurance remained a problem for the courts to solve. And their solution was to hold that there was no relationship at all.

*The Basis For Rejecting The State Law Claim.*

In holding that the benefits of the second injury fund did not inure to self-insured employers, the courts focused upon the financing source for the second injury fund, *viz.*, the accident fund. Until the 1977 amendments, there was no way by which self-insured employers would pay, directly or indirectly, for the financial support of the second

injury fund. For they were no longer required to make any premium payments at all into the accident fund, from which the operation of the second injury fund was financed. *See* Pet. 3a and 4a.

The state courts took this fact as an indication of legislative intent that the new self-insurance system was to be absolutely self-contained, with no relationship to the second injury fund, and accordingly held that self-insured employers were not entitled to the benefits of the second injury fund. In effect, the Washington courts held that a decision by an employer to opt out of the state system, by becoming self-insured, was a decision to opt out of the *entire* system, including any participation in the benefits and burdens of the second injury fund.[2]. *See* Pet. 3a-5a.

The petitioner now argues that this result somehow deprives it of property without due process of law. Such a contention is completely without merit.

*The Petitioner's Federal Claim.*

The petitioner states:

> Although Chicago Bridge and Iron could have elected to remain a state-insured employer without a constitutional deprivation of property, that option is meaningless unless the employer may fully understand the ramifications of making that election and the implications of the legislation.

(Pet. 10)

The petitioner, however, was obviously not interested in fully understanding the ramifications of making that election until this litigation. Certainly the petitioner knew,

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[2]Although not mentioned by the court below, it should be noted that the terminology of the statutes governing the operation of the second injury fund fits only the state system, not the self-insurance system. For example, the version of Wash. Rev. Code § 51.16.120 in effect in 1971 referred to "accident cost rate." *See* App. B. This term had applicability only to employers under the state system, since it refers to the record of injuries for each employer which was used by the Department of Labor and Industries to determine the rate of the premiums to be paid into the accident fund, as explained above. For self-insured employers, who do not pay into the accident fund, there was no need to determine any "accident cost rate." In 1972, the term "experience record" was substituted for "accident cost rate." *See* App. B. But the new term performs the same function as the old and, like the old, has no function at all with respect to self-insured employers.

when it decided to leave the state system immediately after it was afforded that election in 1971, that it would not be paying premiums into the accident fund and thus would not be responsible in any way for the financial support of the second injury fund. Yet it was not curious enough to ask the state agency involved, the Department of Labor and Industries, whether it would still be a beneficiary of that fund. The possibility that the applicable statutes might be construed so as to prevent the petitioner from becoming a "free rider"—entitled to the benefits, but free of the burdens—should have been obvious to the petitioner. Yet it made no effort to obtain a ruling on the matter, either from the Department or from the courts, through a declaratory judgment action.

Moreover, petitioner misperceives the property interest of which it is supposedly being deprived. Petitioner contends that it is being deprived of the right to benefits from the second injury fund, and would have this Court focus solely upon that right. But under the state system, that right was always accompanied by and inextricably linked to an obligation, *i.e.*, the obligation to make premium payments into the accident fund and thereby support the second injury fund. What the petitioner is really claiming now is a wholly new right which it never had before, *i.e.*, a right to benefits from the second injury fund unencumbered by an obligation to make payments into the accident fund. In short, the property interest which the petitioner now claims—the right to be a free-rider—never existed, and the property interest which it actually had was voluntarily relinquished when it elected to become self-insured.

The petitioner not only misperceives the property interest involved, but misperceives as well the scope of protection which the Due Process Clause affords. In *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), employers in the coal mining industry contended that the 1972 amendments to the Federal Coal Mine Health and Safety Act of 1969 violated the Due Process Clause, by imposing upon the employers an unexpected liability for workers' injuries. The amendments under challenge actually imposed liability retroactively, by requiring the employers to

compensate former employees with black lung disease who had terminated employment before the amendments were passed. The Court rejected the Due Process claim, stating:

> But our cases are clear that legislation readjusting rights and burdens are not unlawful solely because it upsets otherwise settled expectations.

*Usery*, 428 U.S. at 16.

In *Usery*, to be sure, the employers were contending that the 1972 amendments themselves were unconstitutional, while the petitioner here is making a somewhat different claim. But that difference brings into focus the most striking aspect of the petitioner's federal claim—an aspect which makes that claim completely untenable. The petitioner is not claiming that the 1971 amendments, or indeed any part of them, are unconstitutional, and thus inapplicable to the petitioner. Rather, it is claiming that the interpretation and effect which the Washington courts have given those amendments were not explicitly spelled out by the legislature—which is, of course, entirely correct and is the very reason why the amendments were before the courts for construction in the first place. But petitioner then argues that because the effect was not clearly spelled out, the Due Process Clause requires that the interpretation most favorable financially to the petitioner must be adopted by the courts. And thus ordinary questions of statutory interpretation, which provide so much of the everyday work of the state and federal courts, would automatically be transformed into Due Process questions.

The astounding scope of the petitioner's theory should alone require its rejection.

## CONCLUSION

For the reasons given above, the petition for certiorari should be denied.

Respectfully submitted,

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## APPENDIX A: 1943 SECOND INJURY FUND
(RCW 51.16.120)

Whenever a workman has sustained a previous bodily infirmity or disability from a previous injury or disease, and shall receive a further injury or disease, and become totally and permanently disabled from the combined effects thereof, then the accident cost rate of the employer at the time of said further accident shall only be charged with the accident costs which would have resulted solely from said further accident had there been no pre-existing disability and which accident cost shall be based upon the experience of the department in similar injuries. The difference between the charge thus assessed to the employer at the time of said further accident and the total cost of the pension reserve shall be charged to the class in which the last injury occurred.

*Laws of 1943, ch. 16 § 4A, p. 31*

## APPENDIX B: 1972 SECOND INJURY FUND
(RCW 51.16.120)

Whenever a workman has sustained a previous bodily infirmity or disability from any previous injury or disease and shall suffer a further injury or disease in employment covered by this title and become totally and permanently disabled from the combined effects thereof, then the ((~~accident cost rate~~)) experience record of the employer at the time of said further injury or disease shall be charged only with the accident cost which would have resulted solely from said further injury or disease, had there been no pre-existing disability, and which accident cost shall be based upon an evaluation of the disability by medical experts. The difference between the charge thus assessed to the employer at the time of said further injury or disease and the total cost of the pension reserve shall be assessed against the second injury ((~~account~~)) fund.

*Laws of 1972, 1st Ex. Sess. ch. 43, § 13, p. 84*

## APPENDIX C: 1977 SECOND INJURY FUND
(RCW 51.16.120)

(1) Whenever a ((~~workman~~)) worker has ((~~sustained~~)) a previous bodily ((~~infirmity or~~ )) disability from any previous injury or disease and shall suffer a further disability from injury or occupation disease in employment covered by this title and become totally and permanently disabled from the combined effects thereof or die when death was substantially accelerated by the combined effects thereof, then the experience record of ((~~the~~)) an employer insured with the state fund at the time of said further injury or disease, shall be charged and a self-insured employer shall pay directly into the reserve fund only ((~~with~~)) the accident cost which would have resulted solely from said further injury or disease had there been no preexisting disability, and which accident cost shall be based upon an evaluation of the disability by medical experts. The difference between the charge thus assessed to ((~~the~~)) such employer at the time or said further injury or disease and the total cost of the pension reserve shall be assessed against the second injury fund. The department shall pass upon the application of this section in all cases where benefits are paid for total permanent disability or death and issue an order thereon appealable by the employer. Pending outcome of such appeal the transfer or payment shall be made as required by such order.

(2) The department shall, in cases of claims of workers sustaining injuries or occupational diseases in the employ of state fund employers, recompute the experience record of such employers when the claims of workers injured in their employ have been found to qualify for payments from the second injury fund after the regular time for computation of such experience records and the department may make appropriate adjustments in such cases including cash refunds or credits to such employers.

(3) To encourage employment of injured workers who are not reemployed by the employer at the time of injury, the department may adopt rules providing for the reduction or elimination of premiums or assessments from subsequent employers of such workers and may also adopt

rules for the reduction or elimination of charges against such employers in the event of further injury to such workers in their employ.

*Laws of 1977, 1st Ex. Sess., ch. 323, § 13, p. 1239*

## APPENDIX D: 1972 SECOND INJURY FUNDING
(RCW 51.44.040)

(1) There shall be ((~~a special account within the accident~~)) in the office of the state treasurer, a fund to be known and designated as the "second injury ((~~account~~)) fund," which shall be used only for the purpose of defraying charges against it as provided in RCW 51.15.120. Said fund shall be administered by the director. The state treasurer shall be the custodian of the second injury fund and shall be authorized to disburse moneys from it only upon written order of the director.

((~~The charge to each class of the accident fund to defray charges against the second injury account shall be made on June 30th and December 31st of each year; and the total industrial insurance premium contributions of each class for the preceeding calendar year shall be used in determining the proportionate charge to each class for the second injury account.~~)) (2) Payments to the second injury fund from the accident fund shall be made pursuant to rules and regulations promulgated by the director.

*Laws of 1972, 1st Ex. Sess. ch. 43 § 27 p.97*

# APPENDIX E: 1977 SECOND INJURY FUNDING
(RCW 51.44.040)

(1) There shall be in the office of the state treasurer, a fund to be known and designated as the "second injury fund", which shall be used only for the purpose of defraying charges against it as provided in RCW 51.16.120 as now or hereafter amended. Said fund shall be administered by the director. The state treasurer shall be the custodian of the second injury fund and shall be authorized to disburse moneys from it only upon written order of the director.

(2) Payments to the second injury fund from the accident fund shall be made pursuant to rules and regulations promulgated by the director.

(3) Assessments for the second injury fund shall be imposed on self-insurers pursuant to rules and regulations promulgated by the director to ensure that self-insurers shall pay to such fund in the proportion that the payments made from such fund on account of claims made against self-insurers bears to the total sum of payments from such fund.

*Law of 1977, 1st Ex. Sess., ch. 323, § 21, p. 1242*